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Martin Hübner's Law of Neutrality and Prize (1759)

A Champion of Neutrality in the Age of Privateering

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1 Why Hübner, and how

This thesis is about the legal concept of neutrality in Martin Hübner's major work *De la saisie des bâtiments neutres, ou du droit qu'ont les nations belligérantes d'arrêter les navires des peuples amis*¹ from 1759. Hübner is one of the founding scholars and thinkers of the modern concept of neutrality that developed during the 18th century.

The book's main theme is the rights and duties of belligerent and neutral nations pertaining to the commercial navigation of neutrals during wartime where the central issue concerns the capture of neutral merchant ships at sea by belligerents. Questions about neutrality and prize law with regard to the law of nations² were particularly important for the Nordic countries from the 18th century and throughout the period of the Napoleonic wars. Neutrality law was vital for maintaining sea trade during the enduring and numerous wars between Great Britain and France. The development of the rules of neutrality also played a significant part in the development of international law.

The aim of the thesis is to treat the principal issues and their solutions discussed by Hübner, which were essential in determining the fate of neutral maritime prize in his time. In as much, we explore a central area of international law of the 18th century that concerns issues touching on the law of the sea and prize law. The main focus will be on specific international methods of exercise of power, which manifest themselves in relation to the commercial navigation of neutral states during wartime. The relevant manifestations here are: the right to capture, visitation and classification of goods by belligerents during wartime but restricted to the commercial navigation of neutral nations. When ships are captured and brought to a friendly port, a local tribunal called "prize court" determines the legality of the

¹ "On the capture of neutral ships, or the right of belligerent nations to capture the ships of friendly peoples". [my translation]

² "Law of nations" was the general term for what is now known as "International law" since Bentham coined the term in 1803 cf. *The Works of Jeremy Bentham*.

seizure and condemnation of the prize. The body of customary international law and treaties that determines the suitability of such proceedings is referred to as prize law.

The issue of neutral rights was raised during the 18th century mainly because of the significant practice of capturing neutral ships at sea by belligerent agents known as privateers. In contemporary times, it has become the standard to base our perception of issues concerning international warfare and security on the idea of the modern nation-state voiced by Max Weber: “a human community that (successfully) claims the monopoly of the legitimate use of physical force.”³ It has become the general view that the state is the primary holder and wielder of coercive power.⁴ Although Weber’s definition has become somewhat cemented in our view of legitimate use of force, historically this wasn’t always the case.

During the 18th century, military reinforcements by privateers sailing under government jurisdiction by carrying “lettres de marque” (or letters of reprisals) became an essential part of naval warfare. Privateering was often used as an efficient means of fortifying ones position while simultaneously harming the enemy’s sea trade. During the 18th and 19th centuries, assaults on neutral merchant vessels by private-owned warships increased considerably. This was due to the rapid expansion of trans-oceanic empires increasing the wealth and scope of seaborne trade and with it the potential for prize-taking. Nations discovered the advantage of hiring private ships rather than having to finance large and costly national military fleets.

There was universal agreement that belligerents had the right to capture enemy ships and property at sea. However, neutral nations, especially from the middle of the 18th century,

³ Weber (1978) p.54.

⁴ Although, there has been a certain shift in the general perception with the last American military action in Iraq and the growing use of paramilitary private security companies by large corporations in “difficult, unstable and dangerous” areas of the globe. Tonkin (2011) p.7.

argued that certain naval powers were abusing this right when they extended it to neutral ships and property as well. Hübner was one of them.

We will first attempt, using Hübner's *De la saisie des bâtiments neutres*, to present and clarify the basis for his discussion. We begin by assessing his fundamental principles and his law of neutrality. We will then turn to the main issues connected to neutral commercial navigation during wartime: belligerent right to capture neutral ships, the right to visit neutral merchant ships and the classification of goods by belligerent states in times of war, known as the doctrine of contraband of war. The solutions to these issues determined the nature of the prize to be judged and were central matters of prize law. The concluding chapter will be dedicated to outlining the distinguishing features of his work and his impact as a central figure in the development of neutrality as a legal concept.

1.1 Hübner and his work

Martin Emanuel Hübner (1723-1795) was a Danish scholar and diplomat who lived in the midst of an epoch in the theory of the history of international law referred to as the French Age⁵.

Hübner was born into a family of Hanoverian functionaries in 1723. Little is known about his early years other than that his family moved to Copenhagen when he was 5 or 6 years old. In Copenhagen he received a good education and in 1744 he became the private tutor of the family of Count Christian Holstein (1735-1799). After his studies, he was appointed professor designatus in philosophy and history at the University of Copenhagen in 1751. The position was unremunerated, and Hübner had to live on short-term assignments and stipends. In 1752, he applied and got a scholarship to do the grand tour of Europe. Although he applied for a stay of four years, he extended it to seven, spending most of his time in France (1754-1760). During those seven years, his travels also took him to Germany,

⁵ Period from the peace of Westphalia 1648 to the congress of Paris in 1815. Grewe (2000). This period is also known as the era of the classical law of nations, or *jus publicum Europeum*. Lesaffer (2011) p.414.

Switzerland, Italy, Holland and Great Britain. During that time he published two important works. In 1758, his *Essai sur l'Histoire du droit naturel* on the history of natural law was published in London. Hübner had simultaneously worked on another text on the subject of the rights of neutrals, which was to become his magnum opus. A draft had been sent as early as 1757 to Hübner's mentor, the Danish foreign minister Johann Hartwig Ernst von Bernstorff. However, the latter had not been impressed and Hübner continued his work on the manuscript for two more years until it was finally published in The Hague in 1759. Despite important publications, Hübner didn't obtain a stable and permanent position in Copenhagen until after the Seven Years' War (1756-1763) on his return from London in 1764. He was then appointed professor of philosophy and history at the University of Copenhagen, a position he kept until his death. Although he may have been a great scholar, Hübner was never a great teacher. He is renowned for having kept the position of professor for forty years without giving a single lecture.⁶

Hübner dedicated his book to the enlightenment of neutral nation's right to exercise their freedom of navigation and maritime commerce during times of war.⁷ He felt prompted by the events of his time to attempt to structuralise the law of nations, pertaining to the rights and duties of neutrals. He was determined to produce a useful book different in approach, contents and solution to his predecessors and that presented practical solutions to the numerous issues of the subject of neutral rights and duties. In his own words, he wished to be of use to "a large number of people, and above all to those working in the business, either in the administration or negotiations, either in maritime justice or in the prize courts or Admiralty courts".⁸

The basis for Hübner's reflections on the laws of neutrality, are natural rights and duties that correspond to natural equity and the laws of sociability. Natural law was essential to

⁶ Bricka (1887-1905) p.208-209.

⁷ Hübner (1759) V.I. p.83.

⁸ Hübner (1759) V.I. p. viii-ix.

the development of international law. A great number of principles and ideas which were indispensable for the development of international law derived from natural law. A central figure in this development was the Dutch scholar Hugo Grotius who published the fundamental work *De jure belli ac pacis* in 1625. Grotius gave an account of the law of nations on the basis of natural law. He established his argumentation on fundamental principles of natural law that at the time were considered to be self-evident universal truths above human sanction. Hübner continues this tradition as he connects his reasoning to “les lois de la sociabilité”, from which he derives his “Code universel des nations” – universal code of nations. Hübner explicitly contradicts the Hobbesian view of man’s natural state as a state in which everyone is at war with everyone else. Hübner believes in the natural sociability of man and therefore that the natural state of mankind is one of peace: “the natural situation of civil societies is fundamentally that of peace and a state of mutual agreement”.⁹

In Hübner’s view the best way to create and secure a homogenised and balanced application of the principles of the law of nations would be to insert them in a systemised codex. From this notion, one has retrieved the term describing Hübner’s approach to natural rights: the code-of-conduct school.¹⁰ Such a code would practically eliminate the chances of misunderstanding between nations, and subsequently the chances of war.¹¹

Hübner is mentioned by among others J.F.W. Schlegel, who in turn influenced the Norwegian “founding fathers”.¹² He was also mentioned in a US Supreme Court case from 1815, in which the dissenting judge expressed:

“He must successfully contend for broader doctrines - for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which

⁹ Hübner (1757) V.II. p.170.

¹⁰ Neff (2000).

¹¹ See this thesis chapter 7.

¹² *Frihetens forskole* (2013) p.303-305.

Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy.”¹³

Being called a champion of neutrality by a Supreme Court judge is no small matter and it beckons the question if the so-called code-of-conduct school that Hübner is supposed to be the founder of, is in fact more “pro-neutral” than the other “neutrality schools” of the 18th century. The quote also suggests the presence of controversy on the subject of the rights of neutrals at sea.

1.2 Historical background

In order to truly assess Hübner’s contribution to the development of modern neutrality law, the study of his treatise on the rights and duties of neutrals at sea in wartime must be placed in a context of preceding and contemporary events.

Hübner’s work was published in the middle of the Seven Years’ war. It was the world’s first global war and stretched over four continents and concerned a great number of alliances and constellations, and was rather representative of the political turmoil of the period. The central belligerent powers were Great Britain and its allies on one side, and the French with allies on the other. Peaceful and neutral nations were often caught in the middle. Trade became extremely politicised over the course of the 18th century, leading to a setting where the greater maritime powers, such as Great Britain, were willing to go to great extents in their attempts to secure and protect their interests against nations that had risen as trade-powers, despite their small size and/or lack of natural resources (for example Holland and Denmark).

The Seven Years’ war was a fall-back from a long period of relative peace in Europe during the first half of the 18th century. The Peace of Utrecht (1713), and treaties of Fredriksborg (1720) and Nystad (1721), terminating the War of Spanish Succession and the Great

¹³ The Nereide - 13 U.S. 388 (1815), cf. <http://supreme.justia.com/cases/federal/us/13/388/>

Northern War, marked the end of an epoch and the beginning of a new era of Western diplomacy. The Peace of Utrecht was meant to settle the great powers of Europe by limiting Bourbon ambitions of hegemony over Western Europe, whilst eliminating French influence and interference in Britain and establishing a protestant succession in the House of Hannover. Europe was able to enjoy three decades of peace that was supposed to be upheld by diplomatic cooperation between Britain and France. However, conflict unavoidably reappeared, but on a somewhat different arena and scale. When war between the two powers restarted in the middle of the 18th century, the attention was directed towards the colonies. As a consequence, the following wars were mainly of a maritime and colonial nature. The damaging by-product was that these far-flung naval disputes affected a larger amount of people than the local dynastic wars of the 17th century. They not only affected the subjects of the belligerents but also the commercial activities of others, including neutral merchants. As a result the disagreements between belligerents and neutrals became an important diplomatic issue.¹⁴

At the beginning of the Seven Year's war, both Sweden and Denmark were members of a neutrality alliance that opposed British methods of naval warfare. Britain derived its methods from doctrines such as The Rule of War of 1756, which was one in a series of English protectionist navigation acts.¹⁵ Although these navigation acts became a major grievance for neutral traders, they insured Britain's supremacy while all other vessels were excluded from trading with their colonies. After a short time, Sweden joined the war on the French side. Denmark clung on to its neutral status and was now confronted with the necessity of negotiating with England on its own on the subjects of reprisal, prize legislation and adjudication.

It was with these negotiations in mind that the Danish foreign minister Johan Hartwig Ernst von Bernstorff sent Hübner to assist the Danish delegation in London. The Danish scholar

¹⁴ Kulsrud (1936) p.3, Marston (2001) p.10-16.

¹⁵ Kulsrud (1936) p. 61-106.

received the order from the Danish government to return to Copenhagen in 1759, while studying in France. While his orders to return were received in 1759, he did not start his return to Copenhagen until 1760 and did not arrive in London before 1761. The negotiations in London were of great importance due to the fact that Danish commercial ships suffered frequently from English privateers during the Seven Years' war. A great number of Danish ships were seized by Great Britain and brought to British ports where they awaited the verdict of the British prize courts. More times than not they were deemed lawful prize by the courts. Danish ship-owners and traders sought help at the Danish embassy to no avail. Their representatives were not familiar with the complicated workings of prize law. Special knowledge was therefore required, knowledge that the Danish envoy at the time, Count Bothmar, was not thought to possess. The Danish Foreign minister Bernstorff had first wanted to send his secretary, a Swiss by the name Roger, however the latter was injured in an accident in October 1759 and died. Hübner was sent in his place as an expert on the subject to assist his fellow countrymen in their predicament.¹⁶

1.3 Legal background

During the 18th century, the law of nations began to emerge as a more distinct branch of legal thought, and started to shed parts of what had been a great miasma consisting of amongst other natural law, divine law, civil law and international law. The element of natural law still remained an essential constituent of the law of nations during the 18th century and early 19th.

The middle of the 18th century marked the beginning of what has come to be regarded as the classic age in the development of international maritime law. During the two great colonial wars of the century, the War of Austrian Succession and the Seven Years' war, central doctrines on colonial trade, contraband, capture, visitation and blockade, were advanced by scholars such as Hübner. The doctrines were consequently defined by lawyers in long and exhaustive opinions in prize cases. These definitions were subsequently included

¹⁶ Bajer (1904) p.209.

in treaties and other proclamations, becoming points of reference and principles ready for future application. Simultaneously with the development of international maritime law as a subject, the classification and definition of the main commodities of international commerce, in particular on questions regarding the trade of such goods and how it affected the relationship between belligerents and neutrals, were in progress.

The notion of neutrality is not a recent term, and was not invented by the scholars of the enlightenment. The use of the term as a politico-philosophical concept, rather than a legal one, can be traced back as far as the 14th century. Long before the doctrines of the 18th century, sovereigns used the term neutrality as a position of non-participation in wars between other nations. Towards and during the 16th and 17th centuries, the term neutrality continued to signify a political attitude of a power that chose not to involve itself in a war between other nations, rather than a legal status. As it wasn't a universally recognised legal principle the material content of such a claim of neutrality had to be agreed upon in a contractual case-by-case basis. As contractual freedom was limitless, the term neutrality would signify whatever the contracting parties had agreed upon. Thus a nation could be coined neutral in an agreement that obliged it to carry out substantial support for one of the belligerents. The nature of this support could vary from weapons to food, even soldiers.¹⁷ Yet the development from the middle of the 18th constituted a shift in the understanding of the concept of neutrality as a legal status. Scholars of the 18th century among which Hübner was the most proficient, developed neutrality as an institution of the law of nations.

Hübner's work was in essence an attempt at a structuration and legitimisation of the laws of neutrality, which was a burgeoning part of the law of nations at the beginning of the 18th century. *De la saisie des bâtiments neutres* is considered "the first substantial exposition of the law of neutrality in history".¹⁸

¹⁷ Grewe (2000) p.371.

¹⁸ Neff (2000) p.48.

1.4 Methodology and sources

The main source for this thesis has been *De la saisie des bâtiments neutres*, a two-volume work of about 600 pages, published in French in 1759 at The Hague.¹⁹ My primary source contains extraordinary and extensive material on several topics, which are beyond the scope of this thesis. My aim will be to present a comprehensive and analytical study of the main issues of the primary source confined to two-thirds of the volume itself. The reason is that these two-thirds represent Hübner's approach to issues according to his understanding of the universal law of nations, whereas the last third is his presentation of some of the issues through examples of conventional law. Hence, I have chosen to omit the last third, not only because of space delimitation, but also because I have found Hübner's samples of international conventions and treaties to be too well suited his purpose that we do not get an impartial view on the relevant conventional law of the period. He has only included a section of treaties that support his view and neglected others. A further study of this would merit its own thesis.

Thus, there is little reference to conventional law in this thesis. The presentation will be centred on the treatment of the relevant issues according to principles of the universal law of nations. Hübner distinguishes between three classes of mores employed by the "free and independent nations of the world" and whose assembly makes out what one might call the customary law of nations. Thus he distinguishes between the customs that apply all the time; the customs that only apply in peacetime and finally the ones that only apply in wartime. Hübner's book treats customs that apply during wartime, the two other categories fall outside of the premise of the issues at hand.

Concerning terminology, it should be pointed out that Hübner uses a multitude of expressions, which seemingly, since he does not explain or state otherwise, are meant to signify "international law". The expressions used by Hübner such as "Droit des Gens Universel",

¹⁹ There was only one edition with an unknown number of copies.

“Code Universel des Nations”, “La loi Universelle des Nations”, “Code Universel des Sociétés Souveraines” and “Droit des Gens primitif” are in this presentation understood to be more or less synonymous with the law of nations and applied accordingly or simply substituted by the general term law of nations.

A comprehensive analysis of his work has required extensive reading of natural and international law up until this period and after. Thus, the rest of the source material has ranged from primary source material of Hübner’s contemporary thinkers as well as later date analysis or mentions of his work in a legal and historical context.

Since Hübner’s book was written in French, any direct quotes in English from his book appearing in this text are my own translation. In some instances I have chosen to leave some of Hübner’s expressions in French when I have thought them to have a special meaning or spirit that could easily get lost in translation.

2 Hübner’s fundamentals

The central subject of Hübner’s book is the capture of neutral merchant ships at sea by belligerents during wartime. Hübner’s work is an attempt at concretising and systemising that which in his opinion is the current law applicable to the protection of neutral rights pertaining to the right of belligerents to capture ships during war. His starting point is to ask on what this belligerent right is founded. The answer, he says, is simple: it rests on the neutrality itself of the powers that claim this status.²⁰ Hübner’s arguments on neutrals’ right to freely navigate and trade are based on natural law: all nations have the right to navigate the ocean, and to trade with all other nations under such conditions and with such goods other nations permit. His idea is that since peace and trade are beneficial to all nations’ welfare, all nations should strive towards preserving them. Consequently, the key question is: To

²⁰ Hübner (1759) V.I. p.95.

what extent can belligerents restrict and stifle trade between their enemies and neutral states?

Hübner begins by laying the foundation of his doctrine on what he considers to be clear principles of the law of nations. The distinguishing elements of this discussion are the status of neutrality and the state of war. Hübner treats these two subjects before embarking on the subjects of free navigation and maritime commerce. He presents the three main pillars of his treatise as: the freedom of the seas, the laws of neutrality and the rules of war.²¹ While Hübner starts with the specific element of war, we will move from the more general denominator: the sea, towards the more specific: war. Thus, the approach in this chapter deviates somewhat from Hübner's sequence of principles in his book. Accordingly, after contemplating Hübner's presentation of the principle of the freedom of the seas, we turn to his treatment of neutral nations' freedom of commerce and finally to their freedom of commerce during wartime. The issues of war and neutrality will be covered in the following chapter.

2.1 Origins and foundations of the freedom of the seas

We begin with the geographical delimitation of the subject at hand: the sea. Hübner's basis is the principle of freedom of the seas²² and he contends that his systemisation, use and analysis of the principles relevant to the law of neutrality is a novelty in the theoretical debate of the issue until then. Before elaborating on Hübner's approach of the principle, we will however place its development in a historical and legal context. The principle of the freedom of the seas is a principle of what is currently known as the law of the sea. The main principles of this discipline can today be stated as the principles of freedom, of sovereignty and of the common heritage of mankind.²³

²¹ Hübner (1759) V.I. p.15, 30, 50.

²² According to Grewe, he was one of the first to have made a direct connection between the rights and duties of neutrals and this principle. Grewe (2000) p.411.

²³ Tanaka (2012) p.16.

Historically, the principal division in the law of the sea was between the notion of the territorial sea nearly as it is known today, which formed a part of the territory of the state but within which other states enjoyed a number of restricted rights; and on the other hand the high seas, which were open to use by all. The territorial sea therefore serves as a delimitation of the high seas. The term “at sea” will hereby be seen as an equivalent to “high seas” and both indiscriminately used as the other. Traditionally this term is understood to encompass all parts of the sea that are not included in the territorial sea or in the international waters of a state. Therefore it currently also comprehends contiguous zones, water over the continental shelf and outside the limit of the territorial sea. The modern law governing the high seas has its source in the notion that the high seas are not open to acquisition by occupation of states (individually or collectively). It is considered *res extra commercium*.²⁴ Historically the emergence of the principle of the freedom of the high seas (*mare liberum*) is connected to the rise of maritime powers and the decline of the influence of powers that had favoured the closed-sea doctrine (*mare clausum*). During the course of the French Age, nations alternated between the doctrines according to their interests and in relation to the policies conducted by other maritime powers.

The early doctrinal debates concerning the law of the sea were centred on the question whether the seas could be made subject of an exclusive right of use reserved to an exclusive sovereign of a state. The writers of the 15th and 16th century that argued for the principle of *mare clausum*, justified it with security reasons, contending that such an approach would keep threatening forces at bay; or for commercial reasons as such a doctrine enables countries to manoeuvre profitable custom regimes and to control navigation.²⁵

In Hübner’s time the principle of freedom of the seas aspired to ensure the freedom of several uses of the seas such as navigation and fishing; in our time other uses such as over-

²⁴ However encroachments have occurred in certain cases/situations as a result of acquisition by general acquiescence. Brownlie (1998) p.230 note 6.

²⁵ Grewe (2000) p.325.

flight, laying of submarine cables, construction of artificial islands and scientific research. Historically, the principle of the freedom of the seas was driven forward by English commercial interests. It is believed that the policy applied under the rule of Queen Elizabeth I of England was the starting point of the principle:

”Neither nature nor public interests permit the exclusive possession of the sea by a single nation or private individual; the ocean is free to everybody, no legal titles exist whatever that would grant its possession to anyone in particular, neither nature nor usage permits its seizure; the domains of the sea and of the air are common property of all men.”²⁶

This was the response by Queen Elizabeth I to the Spanish claim to the seas during the 16th century. Although politically motivated at the time, Queen Elizabeth’s statement has been repeated and elaborated on by many, perhaps most famously by Grotius.

The principle of freedom of the seas might be perceived primarily as a principle aiming at ensuring the freedom of navigation in order to advance international trade across the oceans. This view is fortified by the origin of its defence by Grotius in *Mare Liberum*, published in 1609 with the view of vindicating Dutch rights and trade in the Far East against the hegemony of Portugal at the time. Whilst Grotius defended the freedom of the seas in the 17th century, the Englishman John Selden did the opposite. He was not the only one. Grotius’s arguments were met with criticism from several quarters. Nonetheless, the principle was consolidated as a principle of international law through state practice. Regarding the two men, Hübner says that they both demonstrated their erudition, rather than the veracity and solidity, of their doctrines. Posterity, Hübner says, has judged them thus: Grotius argued badly for a good cause while Selden argued well for a very bad one.²⁷ Hübner’s contention throughout the book is that his own argumentation on the subject, being based on undisputable principles derived from reason and the laws of sociability and systematised in a clear, logical and practical manner, is therefore unquestionable.

²⁶ Queen Elizabeth I of England (1580).

²⁷ Hübner (1759) V.I. p.51.

Hübner's method is to identify and explain the principle of the freedom of the seas by what he calls deduction: through a "logical and systemic approach to the subject" he wishes to prove that it is an unbreakable principle. In his treatment of the freedom of the seas, Hübner touches on all its three main principles: freedom, sovereignty and heritage of mankind, without necessarily separating them or defining them exclusively. We recognise elements of the principle of sovereignty and of the common heritage of man under different names and usually simply as an inherent part of what Hübner regards as the principle of freedom of the seas.

Hübner maintains that the sea is unpossessable. This he explains by defining the notion of "property": "owning property is an accessory state of being which has substituted that of community to the extent made necessary by natural or civil society".²⁸ Property-ownership is consequently based on human constructions and not directly on the very essence of humanity itself. Therefore, Hübner argues, one has to seek its cause and limits in the nature of the thing rather than in the nature of man. The right of using something, to the exclusion of all others, in combination of disposing of it at will makes it "property". If one removes the first condition, it becomes a mere possession. The right of property was established to make everyone able to provide for his own needs without interference by violence, deception or any other way. This, Hübner says, is the great principle from which one must depart to be able to reason accurately on the subject of freedom of the seas. This principle of property and the nature of the thing itself are crucial. Hübner gathers from them that if a thing is to be owned by someone, the first condition is that the thing should be directly or indirectly, by itself or by the situation it creates, useful or usable in one way or another. It stands to reason that claiming ownership of a completely useless thing is absurd. Hübner also deduces that one should be able to grab, take possession of and keep the thing to be able to claim its ownership. Accordingly, it would be "chimerical" to claim ownership of something that cannot exclude anyone else from its use and that is impossible to dispose of

²⁸ Hübner (1759) V.I. p.51.

at will. Consequently, it's impossible to own something that everyone and anyone can benefit from on the same footing without our consent and even less our ability to prevent its use. For a thing to enter into property, the use of it by others must be capable of preventing our own, thus also impair our right to see to our own conservation and need. Without this, the reason for property would in effect self-destruct and disappear.²⁹

From these rules seen in combination, Hübner deduces a principal maxim: things, however useful they might be, that are inexhaustible, and that anyone can use without limiting the use of others because of their immense expanse or because of their nature, cannot become someone's property. Thus, the sea, just like air, light and heat from the sun, can never become someone's property: its use and disposal cannot belong to someone at the exclusion of someone else. A legal consequence of this principle is that the right of first occupancy³⁰ cannot give any nation an absolute hegemony over the sea, since it is unsusceptible to ownership. Hübner jests that by the rule of first occupancy; the great sovereign of the seas would consequently have been the Phoenician sovereign as his people were the first to navigate the seas. But Hübner dismisses such claims as unserious and unfitting the important subject at hand, which concerns everyone. Hübner's view and approach to the freedom of the seas therefore correlates with Grotius' two central principles: that the sea cannot be the object of private or state appropriation and that the use of the high seas by one state leaves the medium available for use by another. The difference between the two thinkers seems therefore to mainly appear in their approach and foundation of the principle rather than in the end result.

Hübner presents what he considers further proof of the freedom of the seas. For someone to own the sea, it presupposes that all others have renounced the right given them by natural equality in such a way that the domain of the sea would become the allocated possession of

²⁹ Hübner (1759) V.I. p.53-54.

³⁰ For more on the principle of first occupancy see Pufendorf (1716) *Book IV, chapter VI: Of Occupancy*.

that one fortunate people by the consent of all other sovereign societies. Hübner concedes that men are free to give the use and disposal of the sea to a single people if they so wished since they possess contractual freedom according to natural law. Such an act would provide that very people with an equivalent right to that of property, or at least of possession. The dominion of the sea would become the estate of a single people at the exclusion of others. This could only happen, says Hübner, through convention or some universal treaty by all mankind, and not by virtue of natural law. However, since no such treaty exists and never will, such an exclusive right to navigate the oceans only exists in the land of possibilities. He does not explain whether this second claim linking the freedom of the seas to contractual freedom is meant as a subsidiary argument or as a clarification of his leading principle of unconditional freedom of the seas. It seems like there might be a paradox in Hübner's discussion on the freedom and property of the seas. He first employs and analyses the notion of property of the sea to prove its incorrectness and fortify the principle of freedom of the seas as its opposite. However, by saying that property of the sea might indeed be possible if all nations agreed to it by a specific convention he somewhat refutes his earlier claim that the sea is unsusceptible to ownership. Nevertheless, as Hübner emphasises, such a convention is extremely unlikely to ever exist and as mentioned earlier, Hübner's presentation relates to the status of the freedom of the seas according to the universal law of nations, not conventional law.

Consequently, the high seas are free for all. In this instance Hübner cites Queen Elizabeth's I response to the Spanish envoy Mendoza quoted above.³¹ However, some limitations to this freedom must be taken into account. Hübner specifies that he has previously talked about the high seas (*pleine mer*) and not of what we now call the territorial sea. He describes the territorial sea as: "those parts of the sea that bathe a country's coastline".³² According to the universal law of nations, Hübner writes, those areas belong as an accessory to the "master" (sovereign) of said country.

³¹ Hübner (1759) V.I. p.56.

³² Hübner (1759) V.I. p.57.

The question of maritime boundaries was crucial during the French Age. The method of delimitation of the territorial sea was, as in the case of land territory, unresolved. In the case of maritime boundaries the international legal term “territorial sea” was developed during the course of the French Age. The reason was that the classic dispute of the Spanish Age over the freedom of the seas faded when the British renounced their legal claim to “sovereignty of the sea” in the English Channel. The 17th century had seen claims of *mare clausum* from naval powers such as England, Denmark, Spain, Portugal and Venice.³³ This leaning changed in the 18th century with the appearance of Dutch policies favouring freedom of navigation. The main issue at hand was the substance of what was to be called “territorial sea” and the extent of a coastal state’s sovereignty. While the ancient Roman rule of not admitting any exclusive rights of dominion over the sea was entirely put to rest, many different suggestions emerged. This rule had previously been constrained by the teachings of the Italian scholars of the Middle Ages, Bartolus de Sassoferrato and Baldus de Ubaldis. Whilst Bartolus attributed the coastal State a jurisdiction of up to a 100 miles from the shore, Baldus “only” attributed 60 miles.³⁴ The 16th and 17th century saw numerous propositions appear. They were variations on the doctrines of the Italians. Furthermore, states fixed the boundaries according to the purpose it would serve so that fishing delimitations were not the same as the ones applied in prize cases. In certain instances another principle was applied: the principle of range of sight. It followed the concept put forward by Grotius in his *Mare Liberum*.³⁵ Following this principle a coastal state wouldn’t tolerate any persecution or attacks on ships along their coastline within a distance from which they still could see land.

Towards the beginning of the 18th century a new principle appeared that came to be adopted by several scholars of the 18th century. “The cannon-shot rule” as it was called deter-

³³ Brownlie (1998) p.230.

³⁴ Grewe (2000) p.327-328.

³⁵ Grotius (1916).

mined that the breadth of the territorial sea should be established by the distance of the reach of artillery. In other words: the range of a cannon shot. This principle was systematised by the Dutchman Van Bynkershoek in his 1702 treatise *De dominio maris* as well as in his *Quaestiones iuris publici* of 1737. According to Van Bynkershoek, a coastal State's jurisdiction fades beyond the reach of arms.³⁶ Hübner was of the opinion that a neutral power could lawfully prevent acts of war within the range of cannons ("a portée de canon").³⁷

There are some practical issues in relation to this principle. Would this mean that where there are no guns there is no jurisdiction? The application of the cannon-shot rule that later became the current and valid principle independently of whether cannons actually existed along the coast or not, developed during the end of the 18th century. A second practical issue is connected to technical progress. The range of a cannon evolved with the progress made in armaments. Because of this a general rule replaced the cannon shot-rule at the end of the 18th century, which stated a three-mile zone. However, several of the larger European powers chose to adopt the cannon shot-rule after the Armed Neutrality of 1780, and it also appeared in later treaties.³⁸ In terms of state practice, the United States were the first to base its neutrality policy on the three-mile rule.³⁹ Sir William Scott (Lord Stowell) introduced the rule into British prize case law in the case of the Dutch ship *Twee Gebroeders* in 1805. He pronounced that three miles was the boundary of neutral territorial waters according to the law of nations.⁴⁰ Five years later, in the case of the *Anna*, Lord Stowell argued:

³⁶ Anand (1982) p.138.

³⁷ Hübner (1759) V. I. p.154.

³⁸ Anglo-French Treaty of Commerce and Navigation of 1786; Franco-Russian Treaty of 1787.

³⁹ The Proclamation of Neutrality of 2 April 1793, issued by President George Washington.

⁴⁰ The Naval Miscellany (2008) Vol. 7 p.133.

”We all know that the rule of law on the subject is *terrae dominium finitur armorum vis*; and since the introduction of fire arms, that distance has usually been recognised to be about three miles from shore”.⁴¹

There was no general unified rule concerning territorial waters during the 18th century. Questions regarding different maritime issues were therefore solved differently: fishery cases were resolved by other boundary-rules than prize cases for example, and this would also vary according to the country where the case was brought. However, the United States respected the three-mile rule, as did the British in prize cases relating to neutral waters. The three-mile rule as a basic principle determining the minimal limit of a coastal States jurisdiction was an achievement of the law of nations of the French Age. However, a semblance of unanimity on the subject of maritime boundaries wasn’t achieved until the 19th century regarding the boundaries of the territorial sea.⁴²

Hübner states two reasons for the existence of a constant rule of territorial sea. The first, he says, is that the country has the ability to take possession of and keep the control of such an area by the means of fortifications and artillery. This refers to the “cannon shot-rule” discussed above. The second reason is that those waters serve as battlements or walls for these lands. Hübner maintains that a nation’s right to protect itself is a perfect one. The ability to control an area and to protect and defend it, are also connected to a principle of sovereignty. In contrast to the principle of freedom connected to the high seas, the principle of sovereignty seeks to safeguard the interests of the coastal state. It promotes the extension of national jurisdiction into offshore spaces and supports a territorialisation of the sea. The modern concept of territorial sea was formulated thusly by Vattel in *The Law of Nations* from 1758:

⁴¹ Grewe (2000) p.331.

⁴² A few countries such as Denmark and Norway contended a wider extent of territorial waters, with a four-mile delimitation.

”When a nation takes possession of certain parts of the sea, it takes possession of the empire over them, as well as of the domain, on the same principle which we advanced in treating of the land (§205). These parts of the sea are within the jurisdiction of the nation, and a part of its territory: the sovereign commands there; he makes laws, and may punish those who violate them: in a word, he has the same rights there as on land, and, in general, every right which the laws of the state allow him.”⁴³

In accordance with the general teachings of the 18th century, Hübner supports the principle of freedom of the seas. This principle aspires to ensure the freedom and equality of all activity and navigation on the high seas. Hübner also adheres to the notion of maritime boundaries and thus also sets clearer frames for his further discussion and treatment of the issue of neutral capture at sea by introducing the element of territorial jurisdiction. In this way, Hübner lays the foundation for the activity on the high seas that is his main concern: the freedom of maritime commerce for neutrals in wartime. The point of departure for his further discussion is the universal and basic idea that the sea is free for all who fare on it.

2.2 Freedom of commerce in general

Hübner connects the freedom of the seas to a general principle of freedom of commerce. The contention is that since all navigation is free on the high seas, the intention and motivation behind it should be free as well. England in particular, who had by the 18th century established a maritime supremacy, encouraged freedom of the seas for purposes of free trade.⁴⁴ The principle was in essence a direct consequence of the freedom of commerce, which was a prerequisite for the expansion and dominion of the new emerging maritime and colonial powers of the 18th century over the rest of the world. The publication of Groti-

⁴³ Vattel (2008) p.257.

⁴⁴ Trade and commerce refer to the exchanging of commodities for other commodities or money. Trade is the general word, whereas commerce applies to trade on a large scale and over an extensive area. In this thesis they will be applied synonymously unless specified otherwise. Hübner uses the word “commerce” which in French encompasses both commerce and trade in the general sense.

us' *Mare Liberum* is evidence of this. The primary purpose of the book was to advocate freedom of commerce on the basis of the freedom of the seas. The events between the Dutch and the Portuguese prompting Grotius' work clearly demonstrate that the freedom of the seas was essentially characterised by the economic and political interests of maritime states.

On the subject of free navigation and commerce in general, Hübner begins by restating his former conclusion: the sea is free for all, and peaceful navigation across the oceans is permitted to all nations. Consequently, no one is allowed to obstruct others who are not his subjects in their trade between themselves. However, there are exceptions to this rule. The first relates to a situation where a nation is already engaged in favour of another other by a convention prohibiting anyone else from doing trade in its country. Hübner uses as an example the case where the Emperor of Ceylon granted the Dutch East India Company the exclusive right to trade in his territories. The second exception is when a nation explicitly renounces the right it had to trade with another as the English did in relation to the Spanish States of the Americas. Hübner mentions the *Asiento* as an antithetical confirmation for the existence of this exception. In the history of colonial trade and in particular slave trade, the *Asiento* refers to a special concession given by the Spanish government to other countries to sell people as slaves in the Spanish colonies between 1543 and 1834. The term most usually refers to the treaty between Spain and Great Britain from 1713, which allowed the British to supply African slaves in the Spanish American colonies for the following thirty years. It stipulated that Great Britain was allowed to send one ship a year to the Spanish colonies.⁴⁵ “La maxime est aussi ancienne que vraie, que l’exception confirme la règle” – the exceptions here confirms the rule, says Hübner. Maritime commerce is therefore in general free for all nations, with the natural consequence that they may travel and trade wherever they’re welcome.

⁴⁵ Postma (2008) p.29-30.

However, according to Hübner, freedom of commerce is not limitless. The only real limitation to nations' freedom of commerce, are the "General Laws of Commerce" of which he states five:

1. Anyone can buy or sell as profitably as possible provided that he does not deceive anyone regarding the properties of the merchandise. Consequently, anyone has the right to seek the most favourable market for his merchandise and for his purchases.

2. No one is strictly obliged to sell things to others that he may himself need. This rule hardly suffers any exceptions when the goods are far from satisfying what Hübner calls "first necessity needs". This rule remains somewhat vague since Hübner neither defines nor provides any examples of what he considers "first necessity needs" other than that they are "necessary for life". Nevertheless, the outcome of the rule is that if one fears with some degree of certainty that one might lack a commodity necessary to life, one can reserve it for oneself and prohibit it leaving the country without being held accountable to the contracting party. This rule relates therefore to a nation's perfect right⁴⁶ (and obligation) of self-preservation.

3. Each state has the right to favour his subjects in matters of trade and navigation before foreigners by making the latter pay entry or exit fees or in any other way. The only requirement is that they keep these practices within what is permissible according to the general law of nations and commercial treaties that might exist between nations.

4. Since no nation is obliged to sell its commodities to anyone, it is even less obliged to buy theirs unless it has explicitly promised to do so. From this principle of contractual freedom Hübner derives the right to sell particular contraband in peacetime as in wartime on the

⁴⁶ Hübner never defines what he means by "perfect right" in *De la saisie des bâtiments neutres*. The definition employed by Vattel in *The Law of Nations* from the year before, might be useful in this instance: "The *perfect right* is that which is accompanied by the right of compelling those who refuse to fulfil the correspondent obligation". Vattel (2008) p.74.

basis of an expressed agreement concluded before the outbreak of war. From this rule he also derives the sovereign's right to prohibit the entry of certain foreign commodities in his country if he deems it harmful to the industry of his subjects or to the general balance of their commerce. Although Hübner does not mention the connection, this rule could also be linked to the right of self-preservation.

5. A sovereign can legitimately prohibit all foreigners from pursuing full or partial trade in territories under his jurisdiction the moment he considers the prosperity of his country to be at risk. The condition however is that this measure stays within what a sovereign would consider just from any other sovereign of a free and independent state who sees himself pushed to do the same. According to Hübner, this right is mostly exercised in regard to colonies where the colonial masters do not ordinarily permit others to trade directly. In America, Hübner says, the Spanish pushed this right to such an extent that England, feeling offended by the practice seized the opportunity to declare war against Spain in 1739.⁴⁷

The famous Navigation Act⁴⁸, which subsisted as an English trade policy since 1651, is according to Hübner a continuation of this right. He claims that this particular law of com-

⁴⁷ The War of Jenkins' Ear (or Guerra del Asiento as it is known in Spain) lasted until 1748 (it was largely subsumed into the larger War of the Austrian Succession after 1742, which ended with the Treaty of Aix-la-Chapelle in 1748). A triggering element of the war is believed to be the unfortunate experience of the British merchant captain Robert Jenkins who had his ear severed by the Spanish coast guard who had boarded his ship in 1731 believing that the British were taking advantage of the Asiento and smuggling on a large scale. This raised such hostility in the British public, that the government saw the opportunity of a war to avenge the "Spanish Depredation upon British Subjects". However the war was mostly a counter reaction to the previous suspension of the Asiento by King Philip V of Spain and thus the exclusion of British interests from the Spanish colonies in America (but which was reinstated in 1739 by the Convention of Pardo), and to the repeated and wide practice by the Spanish of seizing British ships as well as holding and torturing the crew. Rasor (2004) p.124-125.

⁴⁸ Although the Navigation Act didn't distinguish between nations, it was designed to aim primarily at Dutch commerce, stipulating that goods could be imported into territories of the English Commonwealth only by English ships, or by ships of the country originally producing the carried goods. This was intended to cripple the maritime freight trade of oth-

merce and navigation is a work of great and most profound genius. This rule has been a tremendous advantage for England mostly because of the lack of attention by the other maritime nations. Hübner predicts that this advantage might diminish, and the rule even become detrimental to English commerce if the other nations who are in a position to do so adopt and establish similar policies of trade at the opportune moment. He specifies that for this to have any true effect it requires favourable circumstances and above all an aptitude such as the one that enabled the English Act. The advanced state of political commerce of the world signifies that those types of operations are restricted to the masters of the art, which Hübner considers the English to be. The states that were the first to implement such rules and reaped the benefits for a long time have an infinite advantage over the countries that have just begun this “intelligent commerce” as he coined it.

Hübner’s five limitations are mainly directed towards issues of self-preservation and jurisdiction and seem to function as modifications to the rule rather than as strict limits. Therefore, and because of their ambiguous formulation and lack of sanction, they seem to be a set of common-sense guidelines meant as reminders to the reader. However, the last limitation concerning the English navigation act partially reveals Hübner’s thoughts on the major naval power of his time. He seems to admire the English enterprise and quickness of mind concerning maritime commercial law at the same time as he laments its effect on the navigation of the rest of the world. Through his limitations, Hübner presents sensible guidelines in a time of rapidly growing international commerce. Apart from these limitations, Hübner strongly maintains the existence of a constant, general and universal freedom of commerce.

2.3 Freedom of commerce during war

Although Hübner claims that neutral commerce should remain identical during war and in times of peace, it’s obvious that the state of war has a modifying influence on neutral commerce. Neutrals should be able to continue to trade in the same manner during wartime

er nations, primarily the Dutch. The Act increased tension between England and the United Provinces and was a major contributing factor to the outbreak of the First Anglo-Dutch War (1652-1654). Gardiner (1903) vol. ii.

since the conflicts of others do not concern them. However, history shows that with the outbreak of war, inevitable consequences ensue. Belligerents become wary and suspect neutrals of furnishing their enemies with provisions. Hübner simply states that since it is their right to destroy their enemy by any means necessary, the capture of neutral ships became a customary occurrence during naval warfare with the aim of “starving out” their enemies by confiscating goods destined for them. Thus, war becomes not only a state in which nations’ military powers clash openly and violently against each other. It is also a state in which underlying economic interests between belligerents and neutrals conflict.

Hübner presents the subject of neutral commerce during war by posing a specific question: are belligerent states permitted to obstruct neutrals from trading with their adversaries during wartime?⁴⁹ In other words, are neutral nations allowed to keep their natural right of trading with everyone and consequently to continue this general trade with belligerents on an equal footing during war as they would in peace?⁵⁰ To answer this specific question with any clarity Hübner begins by ascertaining some basic principles he considers to be the foundation of all commerce.

The right to do commerce derives first and foremost from the universal right of self-preservation and pursuit of happiness. In the case of general freedom of the seas and of commerce, Hübner also derives the right to trade from the mutual permission between nations and absence of any legitimate prevention. Freedom of commerce comes from a state of peace, which is the natural state of mankind. And finally it springs from “les lois de la sociabilité”, which are essential to the survival of civil societies. Without demand and supply commerce would never survive, because it essentially involves them and no one would deny man or nations the right of self-preservation. Thus Hübner connects the right of neutral commerce to a universal principle of free trade.

⁴⁹ Hübner (1759) V.I. p.65.

⁵⁰ Hübner claims Pufendorf wrote shortly on the subject in a letter, but he has been unable to find it. Hübner (1759) V.I. p.66.

The issue of neutral commerce was the subject of great disagreement during the French Age and Hübner's treatise can be directly associated to the debates on the subject during the 18th century. Except for the objection by some of the professed immorality of neutral trade during on-going wars (the just war approach), the issue of neutral trade can illustrate the two-faced character of international trade in general in the era of mercantilism. On the one hand, trade, and in particular colonial trade was in combination with war the ultimate means of obtaining world hegemony. Among other things, prosperous trade guaranteed the economic resources to finance wars. David Hume suitably captured this battle for world dominion through commerce with the expression "Jealousy of trade".⁵¹ It was often the case that areas of commerce that weren't ordinarily open to neutrals became so during war. Consequently, neutrals benefitted greatly from wars they professed the intention of staying out of. A nation's international trade became a matter not only of economic and political standing but also of its military survival.

On the other hand, trade was seen as a product of the natural sociability of man and as a medium for him to perfect his nature and to civilise him further. This view, among others expressed and developed by Pufendorf, shines in stark contrast with the view expressed by Hume.⁵² Hübner's view on this subject is akin to that of Pufendorf. Hübner insists that the principles of freedom of the seas and freedom of commerce are drawn from pure reason and that they give birth to the following maxim of the law of nations: all peoples who live together in peace and consequently exercise the laws of sociability are permitted to trade together in the manner and to the extent they see fit unless some alternate and passing state does not stand in the way. Applying this maxim to the case of neutral trade means that if the belligerent parties individually allow neutrals to trade on a general basis with each one of them despite the war, other belligerents cannot legitimately prevent it. The reason is that not only do these neutral states enjoy peace with each one of the belligerents individually in

⁵¹ Hume (1985) p.327.

⁵² Hont (2010) p.176.

virtue of their neutral status, the neutral states also, according to Hübner, have a duty to render the belligerent states the service of attempting to reconcile them and re-establish peace.

Hübner does not see any reason why neutral states should refrain from ordinary commerce with warring nations; nor on what grounds belligerents could prohibit neutrals from trading with each one of them as long as the neutrals abstain from everything with a direct and immediate connection to war. Hence, as long as they stay perfectly neutral, commerce with belligerents is free to neutrals.

Yet Hübner endeavours to give a nuanced discussion on the matter and introduces what he considers probable objections to his claims. Certain objections surface in relation to the defence of free neutral trade in wartime. He considers the claim that all commerce automatically fortifies and benefits a country and therefore would fortify one's adversary. Therefore, a belligerent can legally obstruct it since he is permitted to employ any means necessary to impede his enemy's attempts at victory. Hübner disagrees with this view and explains that such an application of the right of war is stretching the rule. The reason is that if this claim were true, it would effectively erase the rights of neutrality. So-professed neutral states would find themselves in a terrible bind since they would suffer all the inconveniences of war without the option of retaliation. This situation illustrates the contradictory situation neutral nations find themselves in when their rights are violated: the moment a neutral retaliates, he engages in warlike actions and acts in a partial manner, thus losing his neutral status.

Hübner does not develop further what a neutral's options might be if such a situation of over-reaching by a belligerent occurs. Hübner does not contemplate the notion that a neutral ship defending itself by force against an illegitimate attack could be seen as an act of self-defence against a "criminal" and not as taking sides in a war that does not concern him (a right any country holds when attacked by pirates, for example). However, with such an

approach, the duty of impartiality might be eschewed, the duty of abstention from all hostility on the other hand, is not.

Hübner specifies nevertheless that the claim that all commerce automatically fortifies a country is not entirely contrary to the truth: commerce during wars can have unfortunate effects on third parties. However, he insists that all commerce does not inevitably fortify a state. He observes that belligerent nations without an important commercial or military fleet, who find themselves inferior to their adversary, will never insist on the claim that all commerce fortifies the state.

Let us consider a scenario where trade conducted between neutral and belligerent, although innocently motivated, actually has led to a fortification of that particular belligerent by indirect means and in an unintended manner. Is the enemy of that belligerent then allowed to prohibit the on-going trade? Hübner does not answer this from the point of view of the disgruntled belligerent. He is first and foremost intent on proving the plight of neutrals and insists that in this situation, the neutral would have had no knowledge of such an end. Any form of prohibition from the adversary would mainly be the neutral's loss. The neutral was simply continuing his enterprises as in peacetime and he asks no less than the opportunity to exercise the same trade with the opposing belligerent to the extent that the laws of commerce permit it and that his very nature and interests demand it. Choosing to render a neutral state responsible for the increase of power of one's enemy because it stems from its commerce with a neutral is charging him with an unfortunate result where he is the cause only by accident. Hübner maintains that neutral states that trade with belligerents are simply exercising their incontestable right and that anyone who does so has never inflicted an injury that may be the subject of criticism. The possible consequences of our just, legitimate and innocent actions cannot hinder us in executing them. Or at least, Hübner says,

there is no authority that may forbid us. This he bases on Roman jurisprudence and pure reason.⁵³

Thus, Hübner ascertains that neutrals enjoy a perfect and irrefutable right of freedom of commerce in wartime as in peacetime; therefore belligerents are under the obligation of letting them enjoy this freedom and not to disturb it in any way. However, some conditions must be met. First and foremost, neutral nations should not leave their neutral character at any time. They mustn't trade with belligerent powers differently than they would in peacetime. Neutrals must keep to their own affairs and not meddle in things that have a direct connection to wars. Neutrals should under no circumstances equip those under occupation with the means of continuing and dragging on the war.

The part of neutral commerce that is particularly problematic is the question of the legality of situations where neutrals are allowed to trade with the colonies of belligerents. When colonies were established, colonial trade was initially strictly reserved for the mother country. Although freight trade became increasingly important, it remained monopolised by native subjects and out of bounds for everyone else. However, instances occurred where the mother country's naval powers were insufficient to deal with its military obligations and commercial needs and ambitions simultaneously. They would therefore open parts of their freight trade to neutrals. The main reproach against neutrals involved in colonial trade during wartime is the fact that they never pursue this kind of trade in peacetime, and as Hübner points out, they wouldn't dare attempt it.

The question it raises is whether this must be seen as contrary to the claim of neutrality since it's directly connected to war. Hübner points out that trade with other colonies than their own is closed to neutrals during peacetime and therefore would become out of bounds again at the close of the on-going war. With these elements in mind, neutral trade with colonies of the belligerents seems to be a direct object of war, and therefore illegal. However,

⁵³ Hübner (1759) V.I. p.73.

Hübner does not see why a sovereign neutral society should refuse a considerable benefit that presents itself to it. It's evident that neutrals may legitimately pursue trade, provided they do not supply goods that are prohibited during war: merchandise deemed to be contraband of war. One reason, he says, is that the ambition behind the opening of such commerce during war is seldom met. Moreover, it will not involve merchandise with any direct or immediate influence on the war. The main reason is that this type of commerce will in any case be limited and regulated by the belligerent's perfect right to block any attempts at assisting his enemy.

During the wars of the 18th century, the economic interests of belligerents and neutrals often clashed. Since foreign and colonial trade was for many European powers (such as Great Britain, Spain, Portugal and France) the most important source of income it enabled the financing of armies and fleets. Thus, from an economic vantage point, colonial trade became both the cause and object of maritime wars of the period. While belligerents were intent on destroying each other, neutral traders were known to reap the benefits from their adversity. While pro-neutral theorists such as Hübner profess that this is unproblematic in relation to the law of neutrality as long as the neutrals do not interfere in the conflicts of others and stay "perfectly neutral", others will claim that seeking to profit from the conflicts of others is morally reprehensible and in essence contrary to the principle of neutrality. However, this claim would often come from nations with strong military and commercial fleets, uninterested in support from neutral navigators in wartime since they had the means to cover their own navigational needs. The earlier theorists of the law of nations (such as Grotius and Pufendorf) hadn't managed to simplify these complications. The problem was mainly that they held on to the rights of belligerents and duties of neutrals without really considering the rights of neutrals in relation to navigation and trade, which Hübner was the first to do in a comprehensive and significant manner. Although Hübner sometimes

uses historical examples⁵⁴ to illustrate his arguments, his aim is to codify the rules and principles concerning neutral navigation in such a manner that they cannot be abused or modified to the benefit of either belligerent or neutral. Hübner notes that it is unnecessary to compile a long list of examples (which he calls “preuves”) of the implementation of a maxim of the universal law of nations. Such maxims are independent of a just or unjust conduct of a state in its regard, and of the wrong opinions of those who are not familiar with it or pretend not to be. The nations that respect it cannot make it more definite and undisputable, and the nations that violate it cannot make it less obligatory. Such maxims do not need any authority to be recognised or to ring true.⁵⁵ Hübner seems in this instance to somewhat disregard the impact of conventional and customary law on the practices of maritime nations, to the benefit of his idea of a universal code of nations. Accordingly, he concludes that there’s nothing that could bring change to the right of neutral powers of trading with belligerents, other than the obligation they have of not directly fortifying the belligerent’s enemies by providing anything that has an immediate correlation to the war.

Traditionally, the notion of neutral rights was severely restricted by belligerent’s rights to the extent that one only referred to neutrals in terms of their duties in relation to belligerents. What essentially distinguishes Hübner from earlier theorists is that he bases his further discussion on neutrality on the general principle of freedom of the seas and not on the rights of belligerents. On the contrary, Hübner seems to define the rights of belligerents on the basis of his understanding of neutrality.

Accordingly, the next step in this presentation will be to look at how he utilises the principles he has established as his foundation for his argumentation and development of neutral rights during wartime.

⁵⁴ In addition to the use of examples from relatively recent history throughout the book, Hübner sometimes illustrates his statements with examples drawn from ancient Greek and Roman history, the Bible and even ancient mythology.

⁵⁵ Hübner (1759) V.I. p.82.

3 Hübner's law of neutrality

3.1 The rights of belligerents in relation to neutrals during war

We are now moving towards the more specific and central elements of Hübner's discussion: the right of belligerents to capture neutral merchant ships during wartime and neutrality as such. This is the area where the laws of naval warfare assimilate with the laws of neutrality. Neutrals engaged in wartime commerce became a part of the commercial warfare and therefore subject to the counter-measures of belligerents. Belligerents would apply the same forceful measures towards neutrals as they had towards the merchant vessels of their enemies. Consequently, they employed the full vigour of their superior naval forces against neutral merchant vessels they believed to be furnishing their enemies, and proceeded to capture them. Hübner does not define or derive the rights of neutrals from the rights of belligerents where neutrality is based on and limited by the rights of belligerents. Instead, the belligerents' right in certain instances to capture neutral ships is based on the very neutrality of the merchant ships. Accordingly, after examining Hübner's establishment of belligerents' rights in relation to neutrals during war, we will study further that very principle which this right derives from: neutrality.

War was considered a legitimate means of obtaining satisfaction for a harm done. However, with the influence of the ideas of the enlightenment in the 18th century, war was also considered a universally destructive force. This view developed in parallel with the escalation of issuances and use of letters of reprisal that enabled the capture of enemy ships and cargo at sea. Hübner defines war in a general manner: a state in which the participants are in turn seeking to reciprocally injure each other either by manifest acts of violence or by other means, with the aim of snatching by force that which in their opinion is rightfully theirs.

In the tradition of Grotius, Hübner addresses the notion of "just war". In Hübner's opinion, there are only two grounds that justify war: that a true offence has taken place according to the law of nations, and if there has been a positive obstruction to a perfect right. Any war

started for and by any other cause would never qualify as just.⁵⁶ There is an additional condition for a war to remain just. The belligerent undertaking it must do so with the view to obtain peace. Peace must be the fundamental purpose of the war for it to be considered just and legitimate. The reasons for this are according to Hübner that the laws of humanity absolutely demand it; that the welfare of any state, no matter its importance or power requires it; that if not, the neutral nations with whom we are at peace would find themselves exposed to all sorts of nuisances and harm. Our conscience dictates us to spare them as soon as our own safety and recovery is secured.

Hübner goes on to discuss the rights of war in relation to neutral nations and begins with the right of waging war itself. It would be absurd to permit someone to undertake something without also allowing them to employ the necessary means of doing it. Accordingly, since waging war is a just action, all that directly derives from it must also be permissible. Hübner states a specific condition: the rights of a third party should remain unscathed. He does not explain which rights those are, however by the term “third party” we are meant to understand neutrals. This general condition does not hinder belligerent nations in employing any means necessary to obstruct the fortification of their enemy by neutral nations, as this is their right. However, this obstruction should not be of such a nature that it steps on the perfect rights of neutral nations: to see to their own prosperity and preservation. Belligerents must therefore always act in moderation when confronted with a situation involving neutrals.

Hübner presents what he calls “rights of war”⁵⁷. On matters concerning these rights, Hübner first determines the extent of the rights of belligerents. We are then left to deduce the essence of the neutral rights of war antithetically. According to him there are three rights regarding neutrals. The first right of war concerns the belligerent’s right to pursue⁵⁸ his

⁵⁶ Hübner (1759) V.I. p.16.

⁵⁷ “Droit de la Guerre”, Hübner V.I. p.22.

⁵⁸ Hübner writes “tuer”, meaning: to kill, Hübner V.I. p.22.

enemy wherever he might find him: at home, in enemy territory or in places that belong to no one and are not subject to anyone's jurisdiction such as the high seas. In the further study of Hübner's work it is presupposed that jurisdiction is territorial. This implies the particular elements of the legal competence of a state often by Hübner and generally referred to as "sovereignty". Consequently, belligerents are not allowed to attack or kill their enemy in places under neutral jurisdiction⁵⁹. This first right and its jurisdictional limitation form the backdrop and foundation of Hübner's two following rights of war.

The second right relates to the belligerents right to ravage, pillage and damage the land of his enemy and his right to confiscate or destroy his enemy's property, provided that he does not commit these acts in territories under neutral jurisdiction. Such territories are sacred, Hübner says, and to exercise any act of violence there would be to injure the sovereignty and supreme power of the neutral state in question. Hübner explains the principle of sovereignty further and says that in such territories and places that are under the empire of someone, it is forbidden to occupy anything without the consent of the sovereign. Furthermore, a neutral sovereign cannot permit or consent to the annexation or invasion of parts of his territory for the unique purpose of war without it damaging his neutrality. According to Hübner, two enemies cease to be enemies when they enter the territory of a neutral third party. They're required to recognize its jurisdiction when they are within its boundaries. The moment one finds oneself within the territory of a sovereign; one is subjected to his laws. This rule, he says, is indubitable and suffers no exceptions. Hübner operates with a strict understanding of the principle of sovereignty.

Hübner's third right of war states that according to the rights of sovereignty, a nation can render itself the master of its enemy's country and territories as well as his property and possessions. To this third rule he adds a limitation: the belligerent must exclude property that

⁵⁹ Hübner here uses the word "dominion". Although the theory of territorial jurisdiction has been refined since Hübner's time, and because he does not elaborate on its significance, it is presupposed that by "sovereignty", "jurisdiction" and "dominion" are meant to signify a legislative and prerogative power and competence.

“visibly” belongs to neutral nations or their subjects. Hübner does not describe the requirements for something to “visibly” belong to a neutral. He states however an exception to his condition of neutrality. This is the “rule of war” which Hübner elaborates the furthest since its premise is nearest the issue of his book. The neutral possessions shouldn’t be weapons or any other effects sent to the enemy with the purpose of aiding him in the ongoing war. This would be contrary to the laws of neutrality and the nations claiming to be so would have effectively left that particular status and have to relinquish the specific privileges derived from it. When a belligerent captures a maritime city, he obtains no right over the neutral vessels that might find themselves in the harbour at the moment of occupation. Hübner specifies here too that this is the case as long as the vessel’s captain and crew haven’t conducted themselves in any way contrary to their impartial character. If the belligerent confiscates the cargo claimed by neutrals to be theirs, it is a habit that comes from the difficulty of clearly proving ownership. In war situations it can be difficult for belligerents to effectively discard any suspicions they might have that the cargo has been fraudulently loaded on the account of the ship’s owner or for one of his fellow countrymen. Hübner insists that when a neutral owner convincingly is able to convincingly justify that he is indeed the owner, he should be reimbursed and his vessel returned to him. Hübner presents an example of such correct conduct towards neutrals from 1438 and thus attempts to establish the impression of a seemingly extended and therefore legitimate course of similar practice. During the war against Lübeck and other Hanseatic cities, the Dutch Assembly ruled that neutral merchandise found on board enemy ships couldn’t be declared as good prize, provided that the neutrals claimed it and proved that they were indeed its owners. This ruling has since then had the force of law.

Hübner concludes on the subject of the exercise of the rights of war that no matter how violent the state of war might be, and no matter the extent of the rights of war, in the case of neutral nations they should never transgress the circumstances that are directly, necessary or immediately connected to the purpose of war. The exercise of the rights of war should never bring any direct or positive prejudice against those that observe an exact impartiality.

Lastly on the subject of the rights of war concerning neutrals, Hübner wishes to expose a legal misconception. The idea he contradicts is one presented by some writers of international law (he does not mention anyone specifically) that when faced with “extreme necessity” the rights of war permit belligerents to seize the land or property of a neutral. Hübner questions whether such occupation is lawful and on what it might be based. The danger and the quarrels of those waging war do not concern third parties who are perfectly impartial and indifferent towards them. Why should third parties then have to suffer insults and grievances from others, Hübner asks. When the enemy of the occupying territory attempts to drive him out of the area, this place becomes the grounds of war. This implies a fundamental contradiction. If a belligerent who is hard pressed and in danger is allowed to seize the territory of a neutral sovereign by force of arms, the latter has the natural right of preventing him by opposing force with force. Thus, he would no longer be neutral. Hübner states that it would be a peculiar law of nations that establishes opposed rights that mutually destroy each other and allows a nation to be neutral and belligerent at the same time in relation to the same parties. Hübner’s aim is to weed out what is in his opinion false pretences and absurd rules and codify once and for all solid rights and complementary duties for both neutrals and belligerents derived from the universal law of nations. The idea is that with such a codification at hand, neither neutrals nor belligerents would be able to infringe on each other’s rights.

3.2 The concept of neutrality according to Hübner

The starting point of Hübner’s definition of neutrality varies somewhat from the one of van Bynkershoek and Vattel. As previously mentioned, his was not an abstract definition of war, but rather the principle of the freedom of the seas, and derived from this a principle of freedom of commerce. This principle acknowledged that every state has the right to trade with all other states in goods and under the conditions as those other states would allow. Hübner gives his first definition of neutrality as a basis for his further discussion of the subject:

”All NEUTRALITY consists of a complete inaction in relation to war, and of an exact and perfect impartiality, manifested with regard to the belligerents, and

which relates to the war itself and to the direct and immediate means of waging it.”⁶⁰

From this we deduct three main observations. He who does not interfere in any way in the war, and who remains perfectly impartial in his actions in relation to belligerents, remains “exactement neutre”. This implies that Hübner might be operating with “levels” of neutrality. He does not elaborate further in this instance, however, as we shall see later, he distinguishes between four “types of neutrality”. Secondly, the fact that one may have a wish or preference for one of the belligerent parties and for his success does not automatically make one quit a neutral status as long as one does not act upon this preference. However, Hübner says, the wise course is not to voice any preference at all. Thirdly, even the most rigorous application of the rules of neutrality should not hinder one’s commerce with one of the belligerents. It should continue as long as one does not seek to fortify a belligerent against his enemy and assist him in any direct way in harming his adversaries.

Hübner goes on to describe the position of the law of neutrality in “le Droits des Gens Universels”:

”Any nation that in reality does not favour one party more than the other and that does not take part in the war as an auxiliary or otherwise, is considered neutral even if it has not explicitly declared it. Neutrality treaties purely and simply as such have little significance in the Universal Law of Nations.”⁶¹

By this Hübner means that neutrality is a universal concept or principle that does not require mention in treaties in order to be effective. It is sufficient to interpret it through the behaviour of nations in relation to the belligerent parties. Thus a neutral status should be universally recognised because of the consistent behaviour of a nation in relation to the belligerent parties and does not require any explicit declaration (although such a declaration could hardly be disadvantageous). Treaties or unilateral declarations of neutrality had

⁶⁰ Hübner (1759) V.I. p.31.

⁶¹ Hübner (1759) V.I. p.32.

existed for a long time before Hübner, however they were usually simple statements of neutrality without any definition of the term. Neutrality was meant to signify a political attitude of a power that chose not to involve itself in a war between other nations.⁶² However, this attitude was never specified and thus the requirements to retain a status of neutrality remained unclear.

Although Hübner might claim that neutrality is a universal and independent concept, he also advocates the existence of different kinds of neutrality: “différentes espèce de Neutralité”.⁶³ He begins by making a first distinction between what he calls general neutrality (“neutralité générale”) and special neutrality (“neutralité particulière”). General neutrality is a state in which a nation, without being allied to any of the belligerent parties, is ready to render equally to one or the other, or both parties the duties that all nations are held to complete towards each other. Special neutrality according to Hübner is the situation of a civil society that has by a convention explicitly obliged itself to remain neutral in an ongoing war or one about to take place. A power that concludes a neutrality agreement finds itself in a state of “special neutrality” (he does not present any concrete examples of such treaties or conventions). Hübner claims that his first distinction between general and special neutrality stems from the law of nations, but that a subdivision can be made in the second category. This subdivision on the other hand is a result of custom (“les Usages”).

The category of special neutrality is subdivided into complete neutrality (“neutralité pleine et entière”) and limited neutrality (“neutralité limitée”). A state would find itself in a state of complete neutrality when obligated to treat both belligerents equally in every respect. It would on the other hand find itself in a state of limited neutrality if the engagement it has entered into favours one belligerent more than the other concerning certain acts and/or behaviour. In Hübner’s opinion this last type of neutrality is in reality a false one, except if one of two conditions is met. First, that the favours in questions were agreed upon before

⁶² Grewe (2000) p.371.

⁶³ Hübner (1759) V.I. p.33.

the declaration of a war or before such a declaration of war was probable. As Hübner puts it, the agreement must be concluded at a time when it was possible to do so in good faith or “innocently”. Second, that the agreement should only favour one of the belligerents in an indirect or unexpected manner. It should consequently seem clear that the one doing the favour did not intend to fortify the belligerent, merely to answer to his own interests without wishing to harm either party. In any case, the eventual injured party will always have the opportunity to exercise the rights of war, which no agreement would have the authority to permit a neutral to violate. Nevertheless, the rights of war are to be modified by reason and the equitable rulings of the law of nations.⁶⁴

Hübner makes a few observations on the neutral status as such. No belligerent nation could coerce a free and independent state into signing a particular or, even less, a limited neutrality. This would encroach on the rights of sovereignty, including the very considerable one of entering or not entering treaties and alliances. However, he says, there are numerous examples that illustrate how individuals do not always follow the laws of equity and that whilst protected by their own power they do not respect the rights of their peers. Nonetheless, the obligation a nation has to an explicit convention of neutrality is only an imperfect one as well as the right of any other to demand it of another. Of course the nation might make such a claim if it reassures another, however the latter cannot hold it against it if it refuses. Yet, a belligerent can oblige other nations who are not involved in the war to rigorously observe a general neutrality. This signifies that a belligerent can forcibly prohibit them from favouring his enemy in any way. Simply put, in relation to war, third parties are not to favour one or the other.

As other scholars of his time, Hübner perceives war as a state, not as a set of separate acts of hostility. It’s a universal state in which a particular set of rules applies, in opposition to peace, in which the laws of peace apply. The main function of formal declarations of war

⁶⁴ Hübner (1759) V.I. p.34.

and peace treaties is to be able to clearly indicate the beginning and end of a state of war.⁶⁵ Consequently, to be able to indicate the beginning and end of the execution of neutral duties derived from the laws of neutrality. Every neutral nation must observe all obligatory or conditional laws without partiality in relation to the belligerents. Neutrals are to satisfy with the same precision both perfect and imperfect obligations they might have to the belligerent parties the moment when such actions show any connection to war. The basic idea is that if a neutral nation has rendered one of the belligerents a service to which he was merely imperfectly bound, he cannot refuse to do the same for the other belligerents, unless that service had no connection whatsoever to war. In that case, the other belligerents have no right to demand it, since the service does not constitute a partial action. The conditions are however that: no harm is inflicted on a third party; the neutral meets his mandatory duties; and the perfect rights of others are not infringed. Hübner maintains that if all of the conditions are met, a neutral nation can without leaving its neutral status still have more or less intimate friendships with belligerent nations.

A neutral nation is never obligated to render belligerents services, whose consequences could be harmful and expose it to great danger. A neutral nation is for example not obligated to give retreat to one of the belligerents in its territory. Especially if the belligerent is armed, then his enemy would easily and rightly so be able to demand to be admitted as well. The neutral sovereign can however welcome members of belligerent nations who present themselves without arms as simple travellers, provided he does the same with regard to the adversary.

Hübner mentions one special right the neutrals have regarding deserters. A neutral sovereign, he says, can receive in his territories the deserters of the belligerent parties without any obligation to return them to their nation of origin. The sole condition being if he is ob-

⁶⁵ Lesaffer (2011) p.431.

ligated to do so by a particular convention (for example a *Cartel*⁶⁶) – usually a bilateral convention or a reciprocal one – in a manner that presupposes that the belligerent party promises to do so regarding deserters from the troops of the neutral state. Without the presence of such a convention, the neutral is free to protect and keep the deserters. Since the neutral sovereign must not interfere in matters of war, he has no reason to take note of the lack of good faith exhibited by some members of the belligerent armies.

Hübner goes on to list and explain a set of particular neutral rights and duties. He begins with four duties. Neutral peoples must stay in a complete inaction towards the war itself and its operations. From the general rule that neutrals must not directly assist any of the parties nor provide material useful in hostilities, unless they are permitted by a particular agreement recognised by both opposing parties, Hübner deduces the first particular duty for neutrals. A neutral nation, cannot without yielding its neutral character, concede any of its territories to one of the belligerent parties at any time during the war. Since it is forbidden to provide war material to any of the belligerents during wartime, it clearly follows that conceding parts of ones territory also is forbidden. Especially since such a possession could in certain instances signify a great advantage and perhaps even be the deciding factor for the outcome of the war. Such a handover is, Hübner says, entirely incompatible with the very nature of neutrality.⁶⁷ Those belligerent nations who demand a part of the neutrals territory as a pledge of their neutrality demand in effect a contradictory thing. If the neutral were to concede to such a demand, he would no longer be entirely neutral.

The second duty of neutrality regards the subjects of neutral nations. They must abstain completely from any communication with the places, cities or ports under siege or under blockade. All commerce with those areas is entirely forbidden for the whole duration of the siege or blockade. Under such circumstances, neutrals should stay away in order to con-

⁶⁶ Cartel ships were employed on humanitarian voyages, in particular, to carry prisoners for exchange between places agreed upon. A ship serving as cartel was not subject to capture.

⁶⁷ Hübner (1759) V.I. p.42.

form to the conditions of exact impartiality and abstention. The third duty of neutrality concerns the matter of the nature of goods. If a neutral people provides goods for a belligerent that are of no determinate use in war or are equally of use in times of war and peace, the neutrals should be prepared to provide the same for his adversary on the same footing and under the same conditions if he demands it. Therefore, in a situation where a neutral has sold provisions to one of the belligerent parties, he must do the same for the other, unless he can prove that he does not have anything left to sell. A neutral's obligations towards the belligerents do not go so far that he should expose himself to shortage and scarcity at home. His obligations outward will always be inferior to the one of self-preservation. The fourth and last duty of the neutral sovereign is what Hübner calls "the great duty of all neutral states".⁶⁸ This is a moral duty. A neutral sovereign must do all in his power to re-establish peace and to this end he must sincerely employ his good offices so that the injured party obtains satisfaction if possible, or at least that the war quickly ends.

After his description and observations on the particular duties of the neutral sovereign, Hübner turns his attention to the rights of neutral nations. The first right of neutrality is the perfect right of a neutral sovereign to expect that belligerent nations observe the laws of sociability toward him and his subjects. Furthermore, that belligerents do not exert force towards him; that they respect his borders, flag and passports; that they protect and favour his travellers and that they do not impede his legitimate commerce in any way. Finally, that they see to that his subjects do not feel any of the consequences of war other than the inevitable ones over which the belligerent parties do not exert any control. The second right says that if the commanders of opposing armies, of men-of-war, of light troops or commercial ship-owners at any point violate the rights of neutrality, the neutral nation injured by the act can legitimately demand complete compensation for his loss, as such he may even apply the right of reprisal and retrieve it himself.

⁶⁸ Hübner (1759) V.I. p.44.

However great the privileges one accords to the violent state of war, it would be an injustice to let neutral countries that respect all rights and duties to bear the weight without retaining some benefice. Hübner specifies however that one cannot hold belligerent nations accountable for all the misdeed of some criminal and irregular elements among its members. The right of reprisal or to take up arms is only valid in cases where belligerent governments accept and tolerate that an injury has been committed towards nations that are his “friends” or has given the culprit protection or offered him a place of retreat.⁶⁹ This supposes that the sovereign knew about the crime and had the power and duty to prevent it. However, although this is the case, a sovereign is considered to have himself committed an act he hasn’t hindered. Consequently, nations at war are mutually responsible with regards to neutral states for the actions of their officers and ship-owners in virtue of an express order or by a letter of marque.

Hübner attempts to clearly distinguish cases where the sovereign is responsible for the actions of his subjects in contrast to situations where the actions of his subjects are mere criminal aberrations that cannot and should not be attributed to the nation as a whole. Hence, if the officers of a belligerent nation violate the rights of neutrals, their sovereign is according to Hübner, always obliged to reprimand them, if he does not wish to be held responsible for it. However, if it can be proved that the order for such reprimanding actions came from the sovereign, then he and his government must answer to it. If a sovereign approves of such acts of violation of neutral rights committed by his soldiers, his consent opens for the option of retaliation by the injured party. According to Hübner, the entire fleet (commercial and military) becomes a legitimate target. Justice should be given to the injured party in form of compensation or, if possible the culprits should be delivered to the injured party so that they are punished according to its laws. Hübner does not connect the question of attribution directly to the duties of neutrals however. Yet, it can be assumed that in such a case, the same duties would apply for a neutral sovereign as for the belligerent if he wishes to uphold his nations neutral status and to avoid any counter-measures.

⁶⁹ Hübner (1759) V.I. p.47.

Reading Hübner's presentation and systemisation of the concept of neutrality, it emerges that he does not clearly distinguish between neutrality at sea or on land. His neutrality concept is a general one that applies equally everywhere. Although he defines the rights of war and neutrality in an overall manner, naval warfare distinguishes itself from land warfare on several counts. Most importantly, naval warfare is largely carried out on the high seas (what we today call international waters), which has no equivalent on land. Warfare on the high seas forces the belligerents to take into account the presence and navigation of neutral merchants who are entitled to use the oceans for their own purposes. However, neutrality, which is based on the principle of freedom of the seas, is in turn the very foundation of belligerents' right to capture neutral ships in wartime. Although Hübner in this first part explains his thoughts on neutrality he does it mainly in relation to the status of the nations as such. However, the main theme for his book is the situation of neutral subjects, or more precisely "neutral ships" in relation to the belligerents. Therefore it is essential to examine and determine the issue of the "neutral character" of ships navigating for commercial purposes. The next step will accordingly be to examine the situations where the capture of such neutral merchant ships is permissible and when it is not according to the behaviour of neutrals.

4 Belligerents' right to capture neutral ships

4.1 Origin and extent of the right to capture neutral ships

During a war, belligerent states regularly attempt to interfere with maritime commerce to prevent ships from carrying goods that will aid their enemy's war effort by capturing them. Hübner never precisely defines the term "capture", however for the purpose of this thesis my understanding is that "capture" happens by taking command of a ship and placing a prize-crew on board to undertake the further navigation of the ship. The ship is then

brought to a port with the purpose of confiscation⁷⁰, usually after the case has been suitably adjudicated in a prize court. According to the law of nations (as well as contemporary international law⁷¹) private property belonging to the enemy is not protected at sea. The principal rule is that an enemy vessel, either merchant or military can be captured outside of neutral territorial waters, i.e. on the high seas and within enemy territory. However, restrictions and modifications must apply to the case of neutral property at sea.

The issue of capture at sea was already a subject matter rife with dispute and even hostility among the naval powers of the 18th century. The particular issue of capture of neutral ships, was even more complicated. Despite the rise in interest in the position of neutrals during wartime, the issues remained difficult to resolve. Hübner's contributions to the "neutral issue" is to go further into the question of capture at sea by presenting a set of "cases" or "situations" when he considers it to be allowed to capture neutral ships, and when it is not. A main question can be discerned from his presentation and argumentation: how do the rules of neutrality interfere with the belligerent's right to capture neutral ships during times of war? Hübner was the first to apply a strict definition of the term neutrality distinctly separated from the general rights and duties derived from natural law. The situations or "cases" that might arise between neutrals and belligerents during wartime are regulated by his strict and absolute definition of neutrality.

A central question when dealing with the issue of maritime capture and its limits is: on what is the right to capture neutral ships during war based on? Hübner explains that the right of belligerent powers in certain instances to capture neutral ships, is not founded on a claim of hegemony (dominion) of the sea, nor on belligerents' authority as a sovereign nation, nor on war itself and the rights that derive from it, nor on the situation or limitations

⁷⁰ Confiscation: to seize or appropriate property as forfeited to the government or to another actual or supposed authority.

⁷¹ Dahl (2008) p.216.

of the navigation and commerce of neutrals, nor on the nature of the merchandise. Thus, Hübner says we are left with one possible answer:

”The right of belligerent nations to sometimes capture the ships belonging to subjects of neutral nations cannot be based on anything else than the very neutrality of those nations.”⁷²

Accordingly, the right of belligerents is both derived from and limited by the neutral status of the nations who claim it. It is the neutrals claim to neutral status, which establishes the boundaries for his actions and consequently also lays the foundation for the belligerent’s right to capture. Having presented the premise for his view on the matter of belligerent’s right to capture neutral ships, Hübner attempts to apply his freshly minted maxims on concrete “situations” in which it is permissible for belligerents to capture neutral ships and in which it is not. These situations are “consequences” drawn from two general rules.

Hübner’s first “general rule” simultaneously states the nature and limits of the right of belligerent nations that is in question here. The first general rule is:

”Belligerent nations are allowed to capture the ships of neutral states, or of their subjects, anytime these ships have committed an act contrary to the laws of neutrality.”⁷³

Nations at war have the right to capture the ships of nations that are neutral in their regard, when it is clear and unquestionable that those ships have assisted or attempted to assist belligerent parties in any way that has a direct and immediate connection to war and by their actions evidently injured the impartiality that constitutes their neutral character. To enlighten the issue of neutral capture completely, Hübner considers a second general rule of neutrality, which is in substance a direct antithesis of the first:

⁷² Hübner (1759) V.I. p.95.

⁷³ Hübner (1759) V.I. p.96.

”Belligerent nations have no right to seize vessels of neutral states or of their subjects when their ships have done nothing that is contrary to the laws of neutrality.”

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In essence, the second general rule signifies that belligerent nations have no right to capture the ships of nations with which they are at peace. It also opens up for a number of exceptions, namely that belligerents are allowed to capture neutral ships, when the latter has acted in a manner that obviously injures their stated impartiality.

4.2 The “situations” of neutral capture

To firmly establish belligerents’ right to capture the ships of nations with which they are at peace, Hübner attempts to illustrate general consequences of a more practical nature derived from the duties of neutrality that will help in the systemisation of the rest of his book. He presents these consequences in two lists of complementary situations where the capture of neutral ships is and is not legal and discusses each situation successively.

According to Hübner’s first general rule, neutral vessels can be legally captured.⁷⁵

1. When they voluntarily assist the belligerent parties in their war efforts.
2. When they are war ships, built in a neutral port for the account or in the service of belligerent parties.
3. When they serve as spies.
4. When they bring ammunition or food provisions to a place under siege or blockade.
5. If they communicate with such a place without the consent or against the intentions of the attacking or blockading power.
6. When they provide the enemy with things that are of direct and immediate use to the war effort.

⁷⁴ Hübner (1759) V.I. p.101.

⁷⁵ Hübner (1759) V.I. p.104-123.

7. When they do not hold a “lettre de mer”⁷⁶, to confirm the neutrality of the vessel.

According to Hübner’s second general rule, neutral ships may not be captured when:⁷⁷

1. They only follow the ordinary trade of their nation, on the same terms as in peacetime.
2. They do not keep any correspondence or communicate with places under assault or blockade without the authorisation of the interested parties permitted to hinder it, in virtue of the rules of war.
3. Navigating for one of the belligerent parties, they do not refuse the same service for the other party, provided the season or their own circumstances allow it within reason.
4. They are not carrying contraband of war, for the account of belligerent nations.
5. They find themselves in an enemy port at the moment of its occupation by a belligerent; as long as their conduct beyond that is in order.
6. They navigate on the high seas and their cargo consists of merchandise belonging to subjects of the belligerent parties at the same conditions.
7. They are in ports, bays or within cannon shot from the fortifications of their own country, or that of another neutral country.
8. War is not yet formally declared, or declared in a way so that the state of war of the belligerent parties is unknown to the neutral countries.
9. During a general truce between the belligerent powers.
10. They are homeward bound, or if they are carriers for another neutral country.

Hübner’s second list of situations is a natural continuation and to a great extent an opposite image to the first one. He illustrates through a new series of possible and probable cases how neutral ships should behave so that there is no doubt concerning their neutral status.

⁷⁶ Passport or sea-letter.

⁷⁷ Hübner (1759) V.I. p.124-164.

The presentation of when it is not permissible to capture neutral ships is longer and more detailed than the previous complementary list. Hübner does not elaborate on why that might be, however this part of the presentation is mainly concerned with the rights of neutrals. Although Hübner accepts the right of belligerents to capture neutral ships in some cases, his wish to protect neutral navigation and commerce shines through. It might be as a natural continuation of this frame of mind that he carefully and clearly examines the situations when neutral ships cannot be legally seized.

When considering the lists of situations where the belligerent is allowed or not allowed to capture neutral vessels Hübner applies his laws of neutrality. Thus, a neutrals conduct is judged according to the duties of abstention and impartiality. Hübner elaborates his two lists consecutively and without always specifying the duties they are associated with. We will here analyse the situations according to the duties they abide by: abstention or impartiality. However, there are situations that although deriving from Hübner's general rules, rest more on formal requirements or answer more to geographic and time limitations than they do the specific duties of neutrality. These situations will be treated last. We begin with those that primarily answer to abstention.⁷⁸

4.3 Abstention

Abstention is together with impartiality one of the two cornerstones of neutrality, and dictates that neutrals must abstain completely from any activity connected to on-going hostilities. The first situation of the first list concerns cases where a neutral voluntarily assists a belligerent in his war efforts and illustrates a clear violation of the duty of abstention. Those who visibly and directly participate in a war effort, to the extent of participating in the assaults of the belligerent nations, can no more be regarded as neutral since they have breached the duty of abstention. The offended belligerent party can legitimately capture any ship that manifestly serves against him since from that moment the neutral is no longer a friend, but an enemy.

⁷⁸ Only primarily, since sometimes a situation concerns both duties of neutrality.

However, such a ship cannot always automatically be declared as good prize and confiscated. Belligerent nations must take into account the possibility that a neutral ship may have fallen into a situation of duress. Often when contemplating a war, a government establishes general embargos on all ships docked in its ports. The government can then choose the vessels that suit its intentions. In such cases, a vessel is constrained by force without any regard to its status. Hübner does not go on to examine whether this conduct is equitable or not, since the matter does not really concern the issues at hand. He simply makes the observation that one cannot according to “exact equity” declare as good prize a neutral ship that has been forced to serve in a military operation. Although neutral vessels must strictly abstain from everything connected to war to keep their neutral character, in such cases as illustrated here, they are considered as mere instruments and cannot be blamed.

However, the main rule is clear: any neutral vessel engaged in military service for an enemy is seizable. Thus, we can also connect the second, fourth, fifth and sixth situations of legitimate capture to the duty of abstention as well as situations two and four of the complementary list.

The second situation of legitimate capture dictates that warships built in neutral ports on the account of or in the service of a belligerent are seizable. This is such a clear violation of the duty of abstention that Hübner considers it unnecessary to prove the legitimacy of the capture of such ships. They would immediately be considered as good prize the moment their owners or destination are known to an adversary. Hübner considers this the plainest case of capture and does not elaborate much further. We can briefly mention, however, that such a ship cannot under any circumstances be considered as neutral because although it is built by neutrals in a place under neutral jurisdiction, its character, use and ownership are purely military and for the expenditure of a belligerent nation.

The fourth situation, in which a neutral brings ammunition or food provisions⁷⁹ to a place under siege or blockade is also regulated by the duty of abstention but adds a jurisdictional element. Bringing ammunition to a place under siege is to directly assist a belligerent in his war effort. Cities are no less won by famine than by violence. It must therefore be equally illegal to provide such places with food and supplies of any kind. The state of neutrality is violated the moment a neutral helps the belligerent parties by providing them with anything that is of direct or immediate use in war.⁸⁰ Thus, ignoring a blockade violates neutrals' fundamental duty of abstention. This echoes the view of Grotius and Gentili.⁸¹ The second explanation Hübner offers can be considered a jurisdictional one and was quite unique for the time. Hübner proposed the idea that the entire area within the belligerent's blockade, meaning the entire spaces between the cordon of ships enclosing the port and the port itself were considered to be under his jurisdiction. The belligerent acquires sovereign rights over the area through occupation. Neff coins this Hübner's "territorial-occupation theory".⁸² Thus, among these sovereign rights we find the right to control the entry and exit of the area. Neutrals who disregard the blockade are therefore punishable by the blockader according to his own laws as ordinary "law-breakers". They must therefore abstain from providing weapons or food-supplies; otherwise they put themselves in danger of legal capture.

The reasons that prohibit neutrals from providing ammunition or supplies to places under siege or under blockade equally prevent them from entertaining any form of communication contrary to the intentions of the adversary with such places. The fifth situation of the first list, as well as the second of the complementary list, clarifies that the intention of the attacking power is indubitable and that it legitimately gives him the right to censor any communication with the outside world. This intention becomes law for all those who are not allowed to act by force or deception because of their neutral status. This "law" is suffi-

⁷⁹ Hübner calls these "munitions de guerre ou de bouche".

⁸⁰ Hübner seems to give the term "use in war" a wide application.

⁸¹ Neff (2000) p.58.

⁸² Neff (2000) p. 58; Hübner (1759) V.I. p.113.

ciently promulgated or formally notified by the considerable measures undertaken by the attacking power to ensure its effect. The belligerent is simply exercising his right and thus does not commit any injustice.

Hübner professes that since a sovereign has the right, even in peacetime, to forbid foreigners from doing trade in his states in order to favour his own subjects; he has an even stronger right to forbid the same foreigners from trading with places incontestably under his control or supposed to be under his control in wartime. Therefore, neutral ships that sail into a port during a siege or blockade without the permission of the current master of the area, and approach the shores with the intention of delivering packages, letters or other things, and that entertain any form of commerce with the place without obtaining permission in advance, find themselves exposed to legitimate capture. Not only has the ship violated the law of the local sovereign, but more importantly it has also failed to fulfil the neutral duty of abstention.

The sixth case of legal capture is a mirror image of the fourth case of the complementary list. According to Hübner this is a more complicated subject than the others⁸³ and will therefore be discussed apart in chapter 6. Belligerents are allowed to capture neutral ships that provide their enemy with goods known as contraband of war because of their direct and immediate use in the war effort. The complexity of the matter lies in the vagueness of the term “contraband of war” and therefore being able to clearly define which goods a neutral ship can or cannot carry during a war. Neutrals must abstain from bringing troops, arms and all other things that visibly serve in a war effort and of which the use by a belligerent is unquestionable. If neutrals in any way infringe their duty of abstention, belligerent nations have the right to stop them and to decide their fate according to the rules corresponding to natural equity.⁸⁴

⁸³ Hübner (1759) V.I. p.118.

⁸⁴ Hübner does not elaborate on what that means.

However, all these situations are prone to exceptions. Although Hübner does not explicitly say so he often presents exceptions to his rules based on the principle of necessity. Thus, a neutral ship forced to anchor in the harbour of a besieged or blocked port because of bad and unexpected weather or by urgent necessity, cannot be captured. Severity cannot be upheld in situations when a ship seeks refuge to save itself from the pursuit by pirates or other enemies, if it is leaking, if a storm forces it ashore, to avoid shipwreck, etc. In all such situations, the proof of good faith and innocence serve as a guarantee against capture and any form of violence from the part of belligerent powers, because the conduct of the neutral subjects has not injured their claimed neutrality. Hübner does not in this instance mention what such proof might be or how one acquires it. However, the most practical and employed method during the 18th century was to conduct a visit and search of the ship in question. This subject will be fully discussed in chapter 5 on visitation.

Neutral ships docked in enemy ports at the moment of siege or occupation, cannot be captured or confiscated. Exceptions include the cases illustrated in situation 1, 4, 5 and 6 on legal capture. Other than those specific cases, the presence of neutral ships in harbours at the critical moment is hardly a crime since they are allowed to carry on any business that does not relate to war. Thus, the seventh situation of the second list is regulated by the duty of abstention. As long as the neutral is not conducting any war related activity while docked in the harbour of a newly declared belligerent, it cannot be legally captured. However, Hübner says, it is always more prudent for neutral ships to stay clear away from a port the moment they hear of an eminent attack. The besieger does not have the right to keep neutral ships from leaving, provided they are not carrying anything that belongs to the territory or the enemies of the besieger.

4.4 Impartiality

The remaining situations in which a belligerent can legitimately capture a neutral ship are principally regulated by the duty of impartiality. This duty dictates that a neutral must at all times behave in an equal manner to opposing belligerent parties: without favouring one of the belligerent parties at the expense of the other with the view to fortify or support him

against his enemy. This is achieved either by completely abstaining from doing something, or by providing exactly the same service or favour for both sides.

Hübner repeats the statement that a war which only concerns a limited number of parties does not concern those who remain neutral, provided that they remain truly so. Consequently, ships of neutral nations that simply continue the ordinary commerce of their nations such as mentioned in the first situation of the complementary list, are not seizable. This rule only concerns neutral sovereign nations that haven't agreed to any modifications on the extent of their natural navigation-related rights by any particular convention. It is assumed that their navigation is free as in peacetime. The sole exception is derived from the very character of neutrality and its perfect impartiality that forbids neutral nations from providing one side of the conflict with things that have a direct and immediate connection to war. If they disobey this rule, they are unquestionably in a situation of capture.

Hübner acknowledges that the successful outcome of a war is more often than not determined by secret intelligence. Neutral nations are obliged, by virtue of the perfect impartiality they profess, and in order to be able to enjoy the advantages connected to their neutral status, not to interfere in anything that concerns war. Consequently, according to the third situation of legal capture, neutral ships that serve as spies for one of the belligerent parties are justly the subject of capture and confiscation to the profit of the adversaries. However, mere suspicions of illicit intelligence with the enemy are not enough. Nations at war must not have too low a threshold to detain or divert the ships of those with whom they enjoy a state of peace. According to Hübner it should be difficult to declare a neutral ship as good prize under pretexts of spying since it is a circumstance that can easily be falsely constructed. However, if a ship reveals its true purpose by the irregularity of its navigation in relation to its professed business, it may be legally seized. For example by: slipping stealthily into or gives frivolous reasons to access the ports of one of the belligerent nations just after leaving those of their adversaries (especially if those are royal or military ports); navigating in waters where enemy fleets are known to sail; having unclear business according to their "Lettres de mer" or possessing documentation with no connection to those places, or not

having been led there by a sudden change of weather; laying anchor without good reason in harbours where war preparations are at hand; loitering for a longer time than the stated goal of their navigation demands and in a different manner than that which corresponds with its stated objective in areas where belligerent powers are stationed.

Hübner insists that neutrality does not require that citizens cease being industrious, renounce the natural advantages of their situation or deny themselves the means necessary to provide for their own needs. Neutrality simply requires that they conduct their business without partiality. The third situation of the complementary list is the clearest example of the duty of impartiality. However, if one of the belligerents draws some sort of benefit out of the ordinary and impartial commercial activities of a neutral by accident, the neutral remains blameless provided he hasn't conducted his business with the war as objective. Neutrality does not oblige the cessation or diminution of standard and impartial industry in a sovereign society no more than it requires one to conduct a ruinous one. From these considerations Hübner draws the conclusion that neutral ships innocently navigating on behalf of one belligerent, and that do not refuse to do the same for the other side are not seizable.⁸⁵ However, the issue can be phrased differently: are neutral nations permitted to navigate on the behalf of belligerents? Hübner reflects on the situation of those nations who only have navigation as a source of income, or at least as their primary source. Nations that are forced to be the carriers of others because of the lack of natural resources in their home country do so out of necessity (which was for example the predicament of the Dutch and the Danes during the 18th century). To prohibit or interfere with their navigation would in reality signify their destruction and remove their means of answering basic needs. It would be an obstruction of their perfect right of self-conservation and consequently a violation of the most sacred laws of humanity.⁸⁶ A nation forced into such a situation would much rather prefer a bloody war than a false peace or neutrality in which it would constantly be at the mercy of inhuman and cruel customs.

⁸⁵ Hübner (1759) V.I. p.132.

⁸⁶ Hübner (1759) V.I. p.133.

In the sixth case of the complementary list Hübner wishes to disprove the claim by some belligerents that they are entitled to capture neutral ships that have been sufficiently and authentically identified as such. He does so by applying “his fundamentals”: the freedom of the seas and the rights of war and neutrality. It is intriguing that Hübner waits with this situation until this point, since it encompasses all his ground principles and the foundation of the right to capture neutral ships is discussed in quite general terms. Hübner suggests an absolute consequence of his second general rule: neutral ships recognised as such can never be captured on the high seas no matter their cargo or destination.⁸⁷ The right to capture disappears when the neutrality of the ship is sufficiently recognised. It is sufficient that the ships clearly show that they are neutral and that they conduct themselves accordingly. By this it is meant that the ships in question behave impartially and abstain from all war operations.

According to Hübner, belligerents have no more right to intercept ships proven to be neutral, than a neutral has of capturing belligerent ones. Furthermore, belligerent sovereigns do not have the right to seize neutral property in their own states unless the owners have violated their laws. Hübner thinks that this reinforces the claim that belligerents are even less entitled to do so on the high seas. The principle of the freedom of the seas dictates that a state of war cannot give possession of the high seas to belligerent powers or authorise them to exercise any jurisdiction upon the subjects of others who are not their enemies and that have remained perfectly impartial in relation to their war. Consequently, the professed right to capture neutral ships on the high seas is not founded on the status of belligerents or neutrals (the rights of war or laws of neutrality), nor is it founded on the location of capture (according to the principle of freedom of the seas). Therefore, this right is founded on nothing, and is consequently void. Although the state of war entitles belligerents to seize and capture everything that belongs to their enemies (wherever the incontestable rights of oth-

⁸⁷ Although Hübner does not expressly say so, this is a mirror and continuation of the principle of free ship, free goods, which shall be explained further in chapter 6.

ers do not stand in the way), it never provides a legitimate power to extend the violence of war further than the heads and property of their enemies. Therefore, they may not extend the violence of war to those who are neutral, and evidently so by their behaviour.

Hübner insists that a belligerent's right to capture neutral ships is only valid for ships that are not recognised and proved to be neutral. Consequently, those who do not produce the necessary documentation stating their neutrality are not exempt from the threat of capture. To benefit from the privileges attached to neutrality, the latter must be identified and affirmed. This can only be done by documentation such as "lettres de mer"⁸⁸, passports, and other papers of that kind. Devoid of these, the belligerent parties may with good reason mistake the ship for the enemy and capture it and hold it until the seized party can sufficiently prove its own neutrality.

Normally, in cases such as the one illustrated in the tenth situation of the second list in which neutral ships are homeward bound or navigating on behalf of another neutral country, there is not any suspicion of contraband of war or any other neutrality breach. However, there is the exception of situations where neutrals leave ports under siege or blockade carrying things belonging to the besieged with the view to withdraw them from capture or to save them on behalf of the besieged. Since the attacker would deem anything that exists in the besieged area as already belonging to him, he can capture neutral vessels that attempt to withhold parts of his impending property when they leave port and before they reach the high seas where the attacker loses jurisdiction. The neutral ship then becomes the subject of good prize for having failed its duty of impartiality. This situation also illustrates an issue of territorial jurisdiction such as the one seen in the fourth situation in the previous list of cases. As a consequence of Hübner's "territorial-occupation" theory, property belonging to a place under siege becomes the property of the besieger even before he is victorious.

⁸⁸ Sea waybill.

4.5 Proof, time and space

Some of the situations laid forth by Hübner are not so much regulated by the duties of neutrality as they describe conditions needed for neutrals to be able to respect their duties. The seventh situation of the first list establishes that in order to enjoy the prerogatives connected to a legal status of neutrality, it is just and necessary that this status is duly demonstrated.⁸⁹ This situation rests more on formal requirements than on one of the cornerstone-duties of neutrality. Hübner explains that it is a neutral merchant vessel's duty to be able to prove the veracity of its claim to neutrality. This means that someone who claims to be neutral must be able to prove by suitable documentation that he truly is in the position to claim the right to the privileges in question; otherwise he will only be exposed to the inconveniences of war.⁹⁰ Belligerents can legitimately capture neutral ships whose papers are not in order or who lack any tangible or reasonable evidence of their neutrality. They have the right to stop neutral ships in an "appropriate manner", until the necessary information has been procured to be able to judge them. However, belligerents are required to release them when it is proven that they truly are neutral and that they have acted accordingly. Nevertheless, the neutral ships are not entitled to any compensation for the delay of their navigation, or the potential costs incurred by the procedure, because they are themselves responsible for the mix-up. Although this seems a little strict, it corresponds with Hübner's strict and absolute rules of neutrality.

The seventh situation of the second list addresses the issue of territorial jurisdiction by establishing a geographical outline of capture. This case simply states that neutral ships cannot be captured when they are in the bays, ports or within the cannon-range of their own country or that of another neutral nation. This case relates to the issue of territorial maritime jurisdiction and sovereignty. A sovereign nation has no reason to suffer the intrusion of foreigners visiting ships docked in its bays and ports and within reach of its cannons. Territorial sovereignty prohibits warships or privateers from visiting or removing enemy

⁸⁹ Hübner (1759) V.I. p.99-100.

⁹⁰ This will be treated further in chapter 5 on visitation.

ships from places under local jurisdiction. From this chain of reasoning Hübner deduces that there is no reason that permits them to act similarly towards neutral ships in neutral harbours. These ships are under the transient jurisdiction of the local sovereign. Ships belonging to neutral nations, staying in the harbours or within reach of the cannons of another equally neutral nation cannot be visited or seized by a belligerent. The matter is easily resolved by a general rule: the ultimate right of command belongs only to the legitimate and actual sovereign of the area, consequently no one can exercise any act of authority without the express or tacit permission of the local sovereign. This equally applies for natural harbours that often serve as places of shelter and repose during difficult weather conditions and long journeys. Consequently, ships that take shelter anywhere along the coastline of a neutral nation are under the protection of the local sovereign. Although it might be difficult to ascertain with precision the extent of maritime boundaries, Hübner maintains that it is generally believed to extend at least to the reach of artillery⁹¹, which the sovereign is always at liberty to use to warn those who forget their place and violate the rights of others.

In the eighth situation of the second list Hübner addresses the legal timeframe of capture. In this case, Hübner maintains that the main rule is that neutral ships cannot be captured before a formal declaration of war. The same reasons that speak for the importance of recognised and public neutrality also speak for the importance of being able to distinguish belligerent nations as such. The state of war must be sufficiently known and declared so that those who wish to stay at peace have the possibility of observing the obligations that follow their neutral status. Although declarations of war are an imperfect right for the aggressed party and that this right is derived from the customary law of nations, it remains of great importance for the neutral nations. Hübner says that a formal declaration of war is “necessary” for neutral nations because it is only fair that they should be instructed so that they may implement the necessary measures concerning their maritime commerce and navigation and concerning the execution of alliances or neutrality treaties with some of the belligerents that they might already be bound by. Belligerent nations cannot expect neutral

⁹¹ See chapter 2.

nations to observe the laws of neutrality unless they are sufficiently and authentically informed of the outbreak of war. This is essential because it was often difficult in the 17th and 18th century to distinguish between actual hostilities related to war and simple reprisals that could be significant without leading to outright conflict. Neutral nations could also consider such events to be apocryphal and suspect since they have not been authentically and formally declared.⁹² Neutrality is always relative to the state of war and the neutrals can only know the reality of such a status by the means of a formal and authentic declaration of war by those who enter into that state. However, the form of the declaration is less important provided that it is not ambiguous and that it is communicated to neutral nations through sure and accredited channels. Furthermore, in order to trigger the duties of neutrality, it is enough that one of the belligerent parties declares its intentions. Vattel also states that the one who is attacked and wages a defensive war need not make any formal hostile declaration.⁹³

The second list's ninth situation concerns the case of general truce between belligerent powers and also broaches the issue of a legal timeframe for capture. A general truce consists of an absolute cessation of the hostilities or effects of war and does not, for the sake of the neutrals, differ from a state of peace other than by its time-limitation. It is different in the case of a particular truce limited to a place or a certain kind of military activity. Since the war and its consequences continue as before elsewhere and in relation to everything else, such a truce would not change the duties of neutrals, nor the belligerents right to capture (at least elsewhere than the implied areas of the particular truce).

⁹² The reason Hübner insists on the importance of war declarations might be that undeclared wars were almost the rule during the 18th century. As a result of the practise of letters of marque, the application of general reprisals were towards the end of the 18th century, considered to be the equivalent to a declaration of war, to neutral's great confusion.

⁹³ Vattel (2008) p.503, p.505 where he specifies that the reason for informing neutrals of a war declaration is so that they may conduct themselves accordingly.

4.6 Final remarks on the right to capture

When observing the two complementary lists of situations based on possible scenarios of neutral behaviour one is reminded of Hübner's intention when publishing this book. These lists correspond to the kind of handbook approach to the issue of neutral capture that might be useful to "the people in the business". However, it is not entirely clear whether Hübner's enumeration of "situations" is meant to be merely descriptive and illustrative or if it is in fact meant as an exhaustive compendium of all possible and practically relevant situations where the issue of capture might arise. The variety of situations and the detailed and researched solutions seem to speak for the latter, in which case Hübner's lists truly functions as a "code-of-conduct" for both neutral and belligerent ships during wartime.

The right to capture neutral ships ranks among the rights of war and is founded on the very nature of neutrality. If a state has declared itself neutral, or more practical still, not declared the contrary, any ships belonging to his subjects that attempt to meddle in the quarrels of belligerents are not automatically considered to be his responsibility. Accordingly the owners of these ships have none other than themselves to blame if they suffer any consequences. Neutral states are obliged to disclaim them if they do not wish to be held accountable and the injured party is free to act towards them as they would an enemy. However, it is evident that belligerent powers should only choose to use force against the subjects of neutral nations in cases where there is evident bad faith or deliberate and immediate action against the interests or military operations of belligerents. Such a breach wholly authorises the use of physical coercion by a belligerent. However, as Hübner puts it, the belligerent must have reasonable grounds. The next step is therefore to examine how a belligerent might gather the necessary information to enable a legitimate capture.

5 Belligerents' right of visitation on the high seas

Although there was both a will for, and obvious development, in the clarification of neutral rights and duties during the 18th century, several practical issues remained. They mostly concerned the matter of capture at sea. Hübner stresses that the right of visitation must be

firmly separated from the right of capture. However, the right of visitation remains a prerequisite to the right of capture. And although Hübner does not plainly say so, the factor of visitation was repeatedly applied as the principal means to ascertain a ship's status and enable its capture.

One of the main difficulties associated with the capture of neutral ships was to distinguish what really comprised neutral character, and what was required to consider a ship as neutral. We have seen Hübner's queries and reflections on the issue of capture through a series of possible and probable scenarios where the status of the neutral must be ascertained. However, a practical and important problem that arose as a consequence of the issue of neutral capture was the matter of clearly determining the character of a ship. Armed with the sufficient tools to determine the character of neutrality, the next step was to gather the necessary information to prove one way or the other the legal character of a ship stopped at sea. The solution was to give the belligerents the possibility of visiting and searching ships flying neutral colours that they met on the high seas. Although the very right of visitation (sometimes referred to as the right to visit and search and more commonly known today as the right of inspection) was disputed over the centuries, as was the basis for this right, we have briefly seen that Hübner upholds the existence of such a right.⁹⁴ We shall now look more closely at what this right consists of, its extent and limitations, its basis, and finally the formal requirements concerning the visitation of neutral merchant ships.

5.1 Definition and extent

What is the right of visitation? Hübner views it thus: by visitation of neutral ships is meant the act by a warship or privateer bearing a "lettre de marque" from a belligerent power, by which they ensure themselves of the actual neutrality of the ship flying a neutral flag. The goal is to be able to exempt the ships from the rigors and hostilities which they are in right to exercise and even obliged to do so against their enemies. This definition Hübner says, is

⁹⁴ Cf. previous chapter and Hübner (1759) V.I. second part, chapter III.

in accordance with the principles of the universal law of nations.⁹⁵ Hübner's definition seems also to be in accordance with the law of armed conflict of our time: by visitation is meant the right to board and control the ownership, cargo, destination, etc., of a ship based on the information of the ship's papers.⁹⁶

Although visitation is a belligerent's incontestable right, Hübner states a first limitation: the belligerent does not have the right to a "detailed account of the ship"⁹⁷. By "detailed" Hübner seems to mean a comprehensive and forceful search of the ship. The visit of a neutral ship must never extend beyond that which is necessary to establish whether the ship is neutral or not. This should be easily remedied, Hübner argues, by an inspection of the documents on board the ship, unless there is a strong suspicion of any deception. In that case Hübner allows a light "coup d'oeil" over the ship and its crew. Belligerents are not allowed to stretch their right beyond this. According to Hübner these are the limits presented by the universal law of nations regarding visitation of neutral ships. It clearly follows the rule, he says, that belligerents and privateers bearing "lettres de marque" are allowed to demand to see the "lettre de mer" or other documentation of the neutral ship to state their status. They can also ask about the construction of the ship, its ownership, and about the crew's nation of origin. However, they are not entitled to search the ship any further. Reason states that without this limitation, belligerents would be able to forcibly search the entire ship and break open crates and cases, which would ruin perishable or other fragile goods, even if the ship's papers were in order. Thus, the navigation and commerce of neutral nations would no longer be free, which is a right they hold according to the "universal laws of sovereign societies and even humanity".⁹⁸ If one allowed belligerent such an unlimited right, neutrals would not be able to trade at all. Their losses would surpass their profit and no tradesman does business on those terms. Hübner states further that the "verdicts of the universal code

⁹⁵ Hübner (1759) V.I. p.233.

⁹⁶ Dahl (2008) p.238, note 324.

⁹⁷ Hübner (1759) V.I. p.144.

⁹⁸ Hübner (1759) V.I. p.240.

of sovereign powers”⁹⁹ (he does not specify what he means by it but I assume that he is referring to international customary and arbitrational law) take issue against this type of conduct by belligerents who, unsatisfied with the presentation of “lettre de mer” and other certificates of the neutral nations, proceed to search the ships by force and with violence. Such behaviour merits to be sanctioned as manifest violations of the law of nations.¹⁰⁰

Hübner’s approach to visitation deviates somewhat from the understanding of others. It is a terminological issue as well as a material one. Where Hübner only allows a right of visitation, other writers as well as the conventional and customary law of nations include the right to search: the so-called “right of visit and search”.¹⁰¹ This right is a continuation of the right to visit where the right to control the papers is extended to a physical control of the ship and its cargo. According to Kulsrud, the right of “visit and search” was considered an incontestable right by the maritime powers of the 18th century. The right consisted of a visit and search of neutral merchant vessels upon the high seas and in territorial waters of belligerent nations in order to ascertain whether such vessels were in any way connected to the on-going hostilities.¹⁰²

⁹⁹ ”Les arrêts du Code universel des Puissances Souveraines”. Hübner (1759) V.I. p.241.

¹⁰⁰ Hübner (1759) V.I. p.241.

¹⁰¹ Indeed in contemporary international law, the right to search is considered an eventual continuation of the right of visit unless stated otherwise. Dahl (2008) p.238, note 324. Black’s Law Dictionary: “*right of search*” – The right to stop, visit and examine vessels on the high seas to discover whether they or the goods they carry are liable to capture; esp., a belligerent state’s right to stop any merchant vessel of a neutral state on the high seas and to search as reasonably necessary to determine whether the ship has become liable to capture under the international law of naval warfare. This right carries with it no right to destroy without full examination, unless those on a given vessel actively resist. – Also called *right of visit*, *right of visit and search*, *right of visitation*, *right of visitation and search*. Black’s Law Dictionary (2004) p.1350.

Black’s Law dictionary: “*visit*” – A naval officer’s boarding an ostensibly neutral merchant vessel from another state to exercise the right of search. This right is exercisable when suspicious circumstances exist, as when the vessel is suspected of involvement in piracy. – Also termed *visitation*. Black’s Law Dictionary (2004) p.1602.

¹⁰² Kulsrud (1936) p.256.

Hübner insists that belligerents do not have the right to search through ships, not even to ascertain their true status of neutrality. They are not permitted to break open cases or chests aboard neutral ships by force, nor move or displace any of the cargo, nor rummage through them and turn everything upside down in order to find out the status of the ship. They should also refrain from any insolence, impertinences and other actions beyond their competences. All these violations are considered criminal abuses of the rights of war.

Kulsrud claims that Hübner prohibits the right of visit and search, and bases this on Hübner's theory of sovereignty. He is referring to Hübner's opinion that a sovereign occupies the area of the sea directly beneath his sailing ship.¹⁰³ When reading Hübner it is however absolutely clear that he allows visitation. As in the words of Sir Scott in the case of *The Maria* from 1799: "All writers upon the law of nations unanimously acknowledge it, without the exception even of Hübner himself, the great champion of neutral privileges."¹⁰⁴ The nuance that seems to have evaded Kulsrud is that Hübner distinguishes between the act of visiting and that of searching. While Kulsrud as well as other Anglo-American theorists, politicians and navigators since the 17th century apply the expression "visit and search", Hübner only uses "visitation" or "visit". There is no explicit explanation to be found for this. If conducted on the high seas, the act of searching the ship is according to him a violation of the integrity of the ship and its sovereignty. Therefore Hübner's distinction becomes quite a methodical nuance, since a belligerent's opportunity of combing through the ship and determining a proper inventory should be restricted to the instances where the visit of the ship has led to suspicion and the ship is properly brought in to be determined as good prize or not by a prize court. Only then can a belligerent party go through the entire ship's cargo to determine its status.

Continental theorists disagreed on the extent of the right to visit neutral ships as well. The German Pufendorf only referred to the right briefly in his observations on enemy goods

¹⁰³ See chapter 6.

¹⁰⁴ Robinson (1853) Vol. I p.361.

aboard neutral ships. However, he stated that it was lawful to detain a neutral vessel in order to determine whether it truly was neutral as her flag indicated (which might be deceptive) to examine the documents on board.¹⁰⁵ Pufendorf seems therefore like Hübner, to restrict the right of visitation to an inspection of the ships document. The Swiss Vattel, however, supported an extended right to visit and search stating: “ We cannot prevent the conveyance of contraband goods, without searching neutral vessels that we meet at sea: we have therefore a right to search them”.¹⁰⁶

When generally talking about the right in question, the term “visitation” or “visit” will be employed since this is the term applied by Hübner and covers the minimum act of stopping and boarding a ship for document-inspection. When a distinction is required, the term “visit and search” or simply “search” will be specifically applied.

5.2 Conditions and restrictions

Although the scholars of the 18th century stated that visitation ranked among the belligerent’s inherent and incontestable rights, they also presented conditions and sometimes restrictions to its exercise. The universally acknowledged condition for legitimate visitation was that it had to be undertaken by a warship or properly commissioned privateer. Thus, a merchant vessel belonging to a nation at war could not undertake a visitation of a neutral merchant ship unless carrying a legitimate “lettre de marque”.

Hübner shared this view. It is natural and logical that a belligerent nation has the right to visit neutral ships during wartime, Hübner says. The exercise of this right is restricted to the ships that properly compose the belligerent’s navy. However, this derivation does not automatically apply to privateers. The latter must always bear a “lettre de marque” or other “authentic proof” of commission by a belligerent sovereign, or else one could easily consider and treat the crews as simple pirates. The reason for the distinction between warships

¹⁰⁵ Wheaton (1841) p.92-94.

¹⁰⁶ Vattel (2008) p.532.

and privateers derives from the nature of civil societies, he says. The members of a body politic, when forming a society, renounce the supreme freedom that human beings have over their own actions in favour of a sovereign. In this manner, they produce a unity of will and strength crucial to public welfare. Thus, the citizens of any civil society supposedly renounce a part of their rights attached to their very humanity to the extent required by the common good. Hübner explains that the unification of the rights that the members of the body politic have given away constitutes that which we call “sovereignty”. This sovereignty, when transferred to a moral person, makes the latter the sole depository of all those rights and of their exercise. Thus, Hübner bases his argument on a deductive series of reasoning founded on the theory of the social contract.¹⁰⁷ Although Hübner never uses the term “social contract” or anything like it, he describes a situation where a collective of individuals choose to renounce a specific set of rights to a particular unit – here a specific sovereign.

Hübner insists that there is no doubt that the right to wage war is a sovereign’s incontestable right. This signifies that privateers, who are private subjects, are required to bear documentation from their sovereign, proving that he has delegated and extended a part of his supreme right to specific private individuals. Therefore neutral ships can demand to see the documentation of warships or privateers such as “lettre de marque” distributed by their respective sovereigns. If failing to do so, neutrals can act towards them as if they were simple criminals attempting to abuse the war-situation.

Hübner asserts two further conditions to the right of visitation pertaining to the time and place of the exercise of this right. One is only allowed to visit and search neutral ships in places under belligerent sovereignty and places that are under no sovereignty or jurisdiction whatsoever: the high seas. All areas under the dominance of a neutral power or friendly state are strictly out of bounds concerning the right of visitation.¹⁰⁸ Since the right of visita-

¹⁰⁷ Hübner (1759) V.I. p.233-236.

¹⁰⁸ Hübner (1759) V.I. p.256-257.

tion of neutral merchant ships is a right of war and a prerequisite to capture, it can only be executed between a formal declaration of war, and the signing or sufficient publication of peace. Thus, it can only be lawfully conducted within the formal timeframe of an on-going war.¹⁰⁹

Hübner states a general exception to the right of visitation. If a belligerent nation explicitly renounces the right to visit the ships of a specific neutral nation, the former is strictly held to conform to the agreement even when his enemies apply their own right of visitation to its full extent. The still-existing rights of others derived from the law of nations do not authorise him to exercise the same if he has expressively renounced them. Hübner insists that it is morally impossible to break this agreement because of the inviolable faith of treaties¹¹⁰ and that one cannot claim the exercise of a right one has already lost.

However, the last exemption stated by Hübner and which conformed to the general opinion of his time was that belligerent warships and privateers are not allowed to visit and search neutral warships. This exemption he says, is based on the fact that this type of ship carries so many visible markings of its country of origin and purpose anyway that a visit is unnecessary.¹¹¹ This rule was often extended to neutral merchant ships travelling in armed convoys.¹¹² Hübner agreed with this view by asserting that any neutral merchant ship navigating without convoy and consequently without clear markings of its neutrality is obliged to submit to a visit by a belligerent at the appropriate time and place.¹¹³

5.3 Purpose and justification

The main objective of the procedure of visitation is to verify and ensure the neutrality of the ships flying neutral colours. Hübner states that the right of visitation is a direct and nat-

¹⁰⁹ Hübner (1759) V.I. p.257-259.

¹¹⁰ "La foi des Traités est inviolable", Hübner (1759) V.I. p.154.

¹¹¹ Hübner (1759) V.I. p.238.

¹¹² A merchant ship would sometimes travel in convoy, meaning be escorted by a man-of-war for the duration of the journey for protection.

¹¹³ Hübner (1759) V.II. p.91.

ural consequence of the rights of war. Since the law of nations permits sovereign nations to go to war, it must equally permit the visitation of neutral vessels. Hübner presents three “preuves¹¹⁴” of the existence of this right.

War is none other than mutually weakening one another to the necessary extent that enables a solid and reasonable peace. Hübner underlines that this “harm” the belligerents mutually inflict upon each other is what one calls “hostilities”. The universal law of nations absolutely authorises belligerent nations to commit hostilities against their enemies. This perfect right is considered the first right of war. Hostilities are no less legitimate at sea than on land. However, belligerents are held to strictly respect the flag of truly neutral ships. They must carefully avoid that their warships or privateers commit any acts of violence against vessels of neutral nations. Neither should they obstruct their navigation in any way as long as neutral subjects behave in accordance with the laws of neutrality. To satisfy this indispensable duty towards neutral nations, and to be able to distinguish them from their enemies, the belligerents must necessarily be able to recognise them as neutrals. However, this distinction can only be made with any certainty by the means of an appropriate visitation. Therefore, Hübner concludes, belligerent nations have the right to visit neutral merchant ships.

Hübner’s second “proof” is a continuation of the first. For a long time it had been the policy of navigators to also keep flags of other nations and fly them when it suited to disguise their true origin and avoid possible danger. Thus, flags had become instruments of deception and could not be considered as sufficient indication of the nationality of the ship. It was no longer prudent to simply relate to the flag alone when attempting to ascertain the nation of origin of the ship. Therefore, it is crucial to accord belligerent nations the right to visit neutral ships in order to make sure of their status.

¹¹⁴ Proofs. Hübner (1759) V.I. p. 228-232.

Supposing one absolutely refused belligerents the moral right of visitation, this would open up for a series of inconveniences of which one would be inevitable. One would have to accord belligerents the right to treat all the warships and armed vessels they met equally and as enemies. This would signify the introduction of a universal war. If not, the belligerents would be forced to freely let pass all merchant ships flying neutral colours. This would be to withhold them their first right of war, since it is obvious that anyone of their enemies would immediately adopt a neutral flag to avoid attack. Any vessel carrying the neutral flag would then automatically be deemed neutral and the belligerent would completely lose the possibility and advantage of weakening his enemies at sea. Both these arrangements conflict with the laws of reason, Hübner says, and consequently also contradict the universal code of sovereign powers. Therefore, belligerents have the right to visit and search ships flying the neutral flag. This is Hübner's third and final "proof" of the existence of a right of visitation.

However, Hübner's evidence of the existence of a right of visitation is merely an attempt at justifying the necessity of such a right. Yet they resemble the general justifications for the right of visitation during the 18th century. Aside from the common misuse of the neutral flag by belligerent merchant ships and privateers, other considerations also justified the right of visitation. According to European prize law (built upon the provisions of the *Consolato del Mare*¹¹⁵ as well as the conventional law of treaties and customary law), belligerent nations were allowed to prevent neutrals from supplying their enemies with contraband goods or articles directly connected with the hostilities. However, to avoid being held responsible in prize courts for damages because of an unlawful capture, a belligerent privateer was compelled on every occasion to ascertain whether the ship it met on the high seas was truly neutral or not before taking any measures to capture it and its cargo. The first essential step was to stop and visit the ship on the high seas. This was the only way to learn

¹¹⁵ A doctrine drawn up in Barcelona in the middle of the fourteenth century, which recorded maritime law and customs and was considered the highest authority for the western Mediterranean region and beyond. Grewe (2000) p.91.

whether there was any contraband goods or enemy property listed on the bill of lading or hidden among the neutral merchandise, and whether the ship was heading to a neutral port or not.

Up until the 18th century, neutral governments never made any pretence about trying to control the conduct and activity of their subjects at sea. Such control therefore fell to the injured or offended party. The practice of visitation arose for a number of reasons. There was a need to get round and counter the practices of belligerent warships and privateers that were falsely hoisting neutral colours. A second reason was to try to prevent the furnishing of war supplies by belligerent merchant vessels masquerading as neutral vessels. A third reason relates to the issue of contraband goods. This suggests that the reason behind the development of the right of visitation lies in the systemic abuse of the neutral flag rather than in the existence of neutrality itself. This called for orderly and careful precautions, which resulted in the recognition of the right of visitation.

If a visit is conducted appropriately, it should not constitute an offence or insult on the flag of neutral nations. Neither is it then likely to be perceived as an act of superiority and as a violation of the jurisdiction of the neutral nation whose merchant ship is being visited. When appropriately undertaken, the right of visitation should cause no further inconvenience to honest neutral merchants than a small time-delay. Hübner does not deny that belligerent nations have the right to visit neutral ships on the high seas provided that it is conducted in an appropriate manner.

5.4 Formalities, practices and conventions

How should appropriate visitation unfold? Treaties and regulations provided some restrictions and guidelines for the manner in which visitation should take place. An important consideration was that the merchant ship in question might be a pirate ship masquerading as a neutral. Precautions had to be made. The commander of a privateer wishing to examine a neutral vessel should indicate his intent by first hoisting his national colours before firing a signal cannon. When the signal had been fired, rather than bearing down upon the neutral ship, the privateer should lie at the distance of a cannon shot away from the neutral vessel.

A boat was then sent out with two or three men (the rowers were probably not included in the number) who were entrusted to go on board the merchant vessel and examine its passport and other documents presented by the master.¹¹⁶ Hübner presents three reasons for members from the belligerent warship or privateer to go on board the seemingly neutral ship to control the ship. The first is that the objective of a visit is to persuade the belligerent party of the effective neutrality of the ship. Therefore, Hübner says, it is more practical to send the officers from the belligerent ship since they will be able to properly ascertain the documentation of the ship as well as control the manufacture of the ship, the language spoken on board and other relevant circumstances for their endeavour. The second is that between equals it should be the one who is interested in the outcome of a visit that should undertake it. The reason is that an armed vessel risks nothing by letting some crewmembers from a merchant ship on board. However, the neutral merchant ship would fear that it was sending crewmembers on board a pirate ship or a dishonest privateer without any real means of protection and with a real danger of having the ship's documents taken away or destroyed. Therefore, prudence and security dictates that it should fall to the belligerent to send officers onto the neutral merchant ship to conduct the visit.

However, cases of resistance to visitation did occur. If a merchant vessel resisted the attempt to examine its papers, it might be captured and brought into port for adjudication. Vattel: "At present a neutral ship refusing to be searched, would from that proceeding alone be condemned as lawful prize."¹¹⁷ Resistance to visitation was traditionally severely sanctioned.¹¹⁸ Later however, the custom became less severe. Resistance to visitation became grounds for capture and confiscation of the ship. The same penalty was given to other evasive behaviour as throwing the ships papers overboard to hide the true nature of ship

¹¹⁶ This is in accordance with the language of the Treaty of the Pyrenees among others, which was signed to end the war between France and Spain (1635-1659) that had initially been a part of the more extensive Thirty Year's war (1618-1648).

¹¹⁷ Vattel (2008) p.532.

¹¹⁸ The Consolato del mare had even gone as far as allowing the sinking of a neutral ship that refused to cooperate. Neff (2000) p.24.

and cargo. Hübner does not mention this particular issue. However, since he considers it a belligerent's right to be able to visit merchant ships to ensure himself of its neutrality, violating this right could perhaps be seen as a breach of neutral duties. Yet it is difficult to consign such a violation to the specific duty of abstention or impartiality. However, the act of resisting a visit could easily be perceived as suspicious and sufficient grounds for capture. A subsequent trial would then later prove whether the suspicion was correct or not.

Although not all the papers to be found aboard a neutral ship are necessary to prove its neutrality, there are some pieces of documentation that remain essential for that purpose. Hübner presents a list of papers that should be on board a ship, but concedes that they are not all mandatory to prove the "honest" navigation of the ship. According to Hübner, the documents a merchant ship should carry at all times are: passport (or sea letter), sea waybill, certificate of ownership, list of the crew, charter-party, bill of lading, shipping invoice, naturalisation papers, inventory, logbook and bill of health.¹¹⁹ However, among those, only the passport¹²⁰, certificate of ownership and the charter-party are essential to be able to prove the neutrality of the ship.¹²¹

Nevertheless, situations occur where the neutral is not to blame for the lack of sufficient documentation. Hübner illustrates the matter with a recent example of a neutral ship called *Les Trois Princesses*.¹²² The ship was charged with ammunition and construction timber destined to a port in Africa. Since it was a Danish ship it was neutral in all regards. It was stopped however on the high seas by a French privateer who removed the ship's captain and all documents. A guard was instated and members of the privateer's crew were ordered

¹²⁰ According to Hübner it is the only piece of documentation, which the navigators of the "barbaresque nations" demand and by which the ships of their friends are entirely protected from their privateers. Hübner (1759) V.I. p.243.

¹²¹ For full list of documentation and explanation, see Annex.

¹²² Hübner (1759) V.I. p.121-122. Hübner claims that it is from the previous year so probably from about 1758 since his book was published in 1759. However, I haven't found any record of the case anywhere else.

to supervise the Danish ship's progression to a port under French jurisdiction. However, the French privateer with the Danish captain and papers on board was in turn captured by an English privateer and led to an English port. Thus, while the French privateer was forced to England, a small number of members of the French crew were directing the Danish ship to Morlaix in Bretagne. Since the ship was filled with war material and apparently devoid of any kind of evidence of its ownership or intended destination, it was immediately considered good prize by a French prize court. The ship was immediately unloaded and sent to Brest without having waited for the final ruling. However, the moment the Danish papers aboard the French captured privateer reached England and everything was put to light, the French government made no difficulty in releasing the Danish ship and returning the entire cargo. In this case, we perceive it such that France is held towards Denmark to reimburse the navigator and restore all damages and interests because the Danish ship's papers had been in order when the French privateer wrongly captured it. It was probably the privateer's responsibility to reimburse the state for the costs he has caused by this dishonest capture. However, this would be an issue between the French government and its subjects, and would not concern the neutral.

5.5 Final remarks on visitation

The main discussions on the subject of the right of visitation concerned its very basis. The objection to it is quite simple to discern: belligerents possess no sovereign power over the neutrals, thus they have no jurisdiction over them. However, there was a general consensus that such a right must exist in order to be able to ascertain whether a ship was neutral or not. The right was accepted on the condition that it was not done too intrusively and that the belligerents behaved appropriately and abided definite guidelines. On their part, neutral ships were expected to acquiesce and cooperate in the procedure, provided that belligerents kept to the appropriate conduct expected of them. Hence, the "visitation" of the ship was limited to an inspection of the ship's papers. Sometimes it could extend to a physical search of the ship if the documentation proved lacking and there was cause for suspicion. The physical search consisted of an inspection of the cargo, however "rummaging", "going be-

low deck” or breaking bulk (forcibly opening crates and containers) was generally forbidden.¹²³

To be able to capture neutral ships on the high seas, the belligerent must be able to state and indicate solid and reasonable grounds. To determine whether a ship and cargo were subject to capture or not, it was essential to gather necessary information to be able to determine the nationality and behaviour of the crew and the nature of ship’s cargo. Thus visitation was a prerequisite for capture and the first opportunity to determine whether a ship was carrying contraband of war or not. Therefore, having now determined that there is a right of visitation, the next step is to clarify what contraband goods are.

6 The issue of cargo: free ship, free goods and the contraband exception

6.1 The trouble with cargo

The issue of property complicated matters at sea. The general rule was and still is that belligerent property at sea is not protected, which means that than enemy can confiscate both belligerent ship and cargo. What then of neutral ships carrying belligerent cargo and neutral cargo on belligerent ships? Two central questions arise in relation to the capture of neutral ships and cargo: If a neutral vessel carries enemy merchandise, is the belligerent denied the right to capture its cargo because of the respect due to the neutrality of the ship? And in reverse, if an enemy ship carries neutral merchandise in its cargo, should the belligerent who captured the ship return the merchandise to its neutral owners, or does he have the right to appropriate them due to the hostility of the ship where they were found? One solution to these questions was the application of the principle of *free ship, free goods*.

¹²³ Neff (2000) p.36.

The emergent principle of *free ship, free goods* contended that a neutral flag covers the cargo, which meant that goods considered as “free” were exempt from capture. However, there were exceptions to this rule. Some cargo and merchandise would never be considered free in wartime. Those are the goods referred to as *contraband of war*.

Customarily, the rule according to the Consolato del mare¹²⁴ had been a “character of the cargo”-approach to enemy goods aboard neutral vessels. This meant that during wartime, enemy property could be seized wherever found, whilst neutral merchandise on enemy vessels was not subject to confiscation. Thus, by the decisive condition of property, ship and cargo could have different fates. However, an important “leniency” towards neutral freight trade developed concerning transport of enemy goods across the oceans. The general view was slowly turning toward an acknowledgement that goods carried on neutral vessels could not be captured. This rule developed into the principle of free ships, free goods, which is a “character of the ship”-approach to merchandise on board neutral vessels: the ship’s nationality determines the status of the cargo. This principle developed from series of similar treaty provisions where the contracting parties agreed that the belligerent party among them would allow enemy property carried by neutral merchant vessels during wartime to be “covered” by the neutral flag. This meant that enemy property on neutral merchant vessels was shielded and protected from capture during navigation: a neutral ship perforce carries free goods. However, the principle of *free ship, free goods* required a modification or else neutrals would have been able to hide war material on behalf of belligerents, which would be a violation of the duties of neutrality. Thus, the crucial and absolute exception to the principle is the doctrine of contraband of war.

¹²⁴ The “Consolato del mare” and the doctrine of “free ships, free goods”, were the two major guidelines of neutrality law during the 17th and 18th century. They had for a very long time, been applied in combination, by most of the European powers and were deemed to place neutral commerce in a rather favourable position. Cf. http://snl.no/Consolato_del_mare

The neutral powers of the beginning of the Seven Years' war believed that free ships made free goods. They assumed they would be able to carry on their lucrative trade with belligerents as before the war and despite of it. However, Great Britain did not share this view and was notorious for instating rules and doctrines meant as protectionist measures for its own maritime trade and warfare. In light of and as a response to the neutral position, the British developed the Rule of 1756¹²⁵ and applied the "doctrine of continuous voyage"¹²⁶. Their main purpose was to limit neutrals' customary pre-war commerce and to exclude them from any commerce with the colonies along their enemies' shores, which was usually prohibited for foreigners during peacetime. Neutrals such as the Dutch and Denmark suffered under the measures instated by belligerent powers during the Seven Years' war. Denmark, which is of special interest to us because of Hübner, often fell victim to the practices of the British navy and privateers.

6.2 "Free ship, free goods"

During his travels in England in 1757, Hübner claims to having himself counted more than 125 neutral ships held in five or six different English ports and harbours. The ships were held on the account of mere suspicion, accused of carrying French merchandise not even considered as contraband of war.¹²⁷ Hübner claims that this "bizarre situation" of continuous violation of the universal principles of the law of nations almost leads us to believe in

¹²⁵ It carried weight from its implementation in 1756 yet lost some of its power during the American War of Independence, just to regain strength during the French revolution. Madison (1806) p.51-55.

¹²⁶ According to this doctrine, the intended ultimate destination controls the character of the voyage. It is the intention of the master that's decisive, not the intention of the owner of the goods. Thus, although the owner might destine a ship's cargo for a belligerent port, the decision of the captain to choose a neutral berth elsewhere will render the cargo legal and not contraband. Woolsey (1910) p.823-847.

¹²⁷ Hübner (1759) V.I. p.206.

Hobbes “erroneous opinion on the war of each against all”¹²⁸. The violated principle Hübner is concerned with is the principle known as *free ship, free goods*.¹²⁹

Hübner’s approach to this issue is to examine whether a neutral flag “protects” or “covers” enemy cargo¹³⁰ reckoned not to be contraband of war, according to the universal law of nations.¹³¹ His main question is whether it is sufficient to prove by the papers on board the ship that the vessel is in fact neutral and that its cargo is consequently protected against capture and confiscation, as long as it is not contraband. Hübner returns to the fundamental principles of his law of neutrality: the duty of abstention and impartiality. As long as these two conditions are met and satisfied, neutrals have the right to undertake and continue their commercial navigation they were accustomed to during peacetime.

Hübner claims that although the principle of *free ship, free goods* might be universally recognised as a leading principle of the law of nations, the actions of the naval powers do not match their words.¹³² The reason for the consistent violations of the principle is the institutionalised and universal pursuit of international and colonial trade power. In his words: “this inordinate desire to flourish and expand one’s business by violent means at the expense of everyone”¹³³. He links the violation of this principle to the widespread practice by belligerent nations of capturing vessels and bringing them to port on the basis of, in Hübner’s opinion, very slim grounds.

¹²⁸ Hübner (1759) V.I. p.207.

¹²⁹ Or as: “*robe d’ami garantit celle d’ennemi; robe d’ennemi confisque celle d’ami*”, “*free ship, free goods; enemy ship, enemy goods*” for the Americans, or “*le pavillon couvre la marchandise*” which was the expression favoured by Hübner.

¹³⁰ “*Si le pavillon couvre la cargaison*”.

¹³¹ Hübner (1759) V.I. p.198-225.

¹³² Hübner (1759) V.I. p.199-201.

¹³³ Hübner (1759) V.I. p.205.

Hübner seeks to prove the principle of “the flag cover the cargo” in four steps.¹³⁴ The laws of neutrality dictate the duties of neutrals as regards belligerents and determine the obligations of the one in relation to the other. Neutral nations that perfectly tend to their duties can rightly claim the regard due to their flag in all respects. Belligerents are strictly held to leave them to the perfect enjoyment of all rights attached to the state of peace in which they mutually coexist. The right to pursue ones industry and navigation counts among those rights. In this manner Hübner makes the principle of *free ship, free goods* a prerequisite to neutral freedom of commerce.¹³⁵ It is clear, Hübner says, that belligerents shouldn’t disrupt such activity in any way. The neutral flag perfectly covers enemy merchandise provided it is not contraband goods.¹³⁶

Hübner connects the principle further to the freedom of commerce. Neutral nations are generally free to trade with belligerents on the same footing as in peacetime. This freedom should not suffer any limitations except those dictated by the laws of neutrality. Thus, Hübner deduces that this leads to the fact that enemy merchandise on board a neutral ship perforce becomes “free”. He concludes that the neutral flag can be said to perfectly cover non-contraband merchandise in all places under neutral sovereignty or places under no sovereignty at all (such as the high seas).¹³⁷

Hübner contends that it is a universally acknowledged principle that enemy property cannot be seized in a neutral place – neutral territory. By linking the issue of the principle of free ship, free goods, to the issue of overzealous capture, Hübner makes it a jurisdictional matter. He states that a neutral vessel is without question a neutral place. Any cargo belonging to the enemy is no more seizable aboard a neutral ship than it is on neutral territory. Hübner

¹³⁴ Hübner attempts to prove the legitimacy of the doctrine of free ship, free goods by linking it to the fundamental principles of the universal law of nations, which are in turn based on “les lois de la sociabilité” and “la saine raison”.

¹³⁵ See chapter 2.2, on freedom of commerce.

¹³⁶ Hübner (1759) V.I. p.209-210.

¹³⁷ Hübner (1759) V.I. p.210-211.

here presents neutral jurisdiction over the vessel in a different manner. He offers a new principle whereby the contention is that a neutral ship is a continuation of neutral territory and therefore occupies the space of the sea on which it is sailing at any given time.¹³⁸

Lastly, Hübner claims that in a situation where a neutral ship is not carrying contraband and is returning to a neutral port, the neutral flag must exempt the cargo from all capture. The reason being that the ship is only freighting free and “innocent” cargo, is not involved in any aspect of the on-going war and is merely innocently navigating on its own behalf, on that of someone else, or even a belligerent party. This assertion of the principle of free ship, free goods is so notorious, Hübner says, that we find it specifically established as a rule in the conventional law of nations.

The establishment of the principle of free ship, free goods was neither a linear nor unproblematic one. Belligerents often invoked a variety of related maritime rights to continue marauding enemy property aboard neutral ships during most of the 18th and beginning of the 19th century, although by the 18th century most naval powers were bound by treaty to this principle.¹³⁹ However, the application of the principle would alter according to circumstances and national policy changes. Still, towards the end of the 18th century a certain consolidation of the principle took place. The rule was recognised by the greater naval powers as well as others, as a general principle of the law of nations with general implications and purpose. Thus the major and absolute exception to this rule is the doctrine of contraband of war.

¹³⁸ Grotius proposed the notion that a belligerent’s right to capture the property of his enemy in neutral territory is subordinate to the right of neutrals to forbid access to his territory by the would-be captor. Grotius (2005) p.1281. Hübner’s view that a ship at any time occupies the area of the sea it is sailing over can be perceived as a continuation of this. See also Nussbaum (1947) p.140.

¹³⁹ Grewe (2000) p.382.

6.3 The concept of contraband of war

The issue of “contraband of war” becomes relevant when one is faced with the triangle of belligerent – enemy – neutral. The question is whether a neutral should be allowed to trade in wartime on the same terms as in peacetime. For all practical purposes the issue of contraband of war is a two-sided affair. On the one hand, we have the right of belligerents to prevent all supplies that could in any way assist their enemy and contribute to their war effort. Therefore, anyone who attempts to fortify an enemy’s position, automatically becomes one and is liable to be treated as such. On the other hand we have the somewhat competing right of the neutral to trade, as he is not party to the on-going hostilities. The neutral will contend that it is his natural right to trade with nations with which he is in peace and that this right should be respected and not be interfered with beyond what is required by the necessities of war.

Contraband of war was determined entirely by the nature of the merchandise in combination with its destination. Therefore, the general rule of ownership derived from the *Consolato del mare*, did not apply in relation to goods deemed contraband. Therein lies the distinction between goods that are contraband and goods that are simply enemy goods. Contraband goods are not necessarily “enemy goods”. Goods that are susceptible to belligerent use and have a hostile destination are considered contraband of war, while enemy goods are defined by their ownership (nationality of their owners). This meant that cargo categorised as contraband of war, was considered good prize based on its nature and/or destination. Consequently, it functioned as an absolute exception to the principle of *free ship, free goods*.

6.3.1 Hübner’s approach

The central question of Hübner’s discussion on the subject of contraband is: how is merchandise and cargo aboard neutral vessels at the service of or destined for enemy ports de-

defined and categorised according to the principles of the universal law of nations, independently of particular treaties?¹⁴⁰

Hübner's first real mention of contraband of war is in relation to his sixth example of situations when a belligerent nation is allowed to capture a neutral ship.¹⁴¹ The situation in question is when the neutral ship carries goods of direct and immediate use to the war. This issue is problematic, Hübner says, due to the overlying vagueness of the rule, which stems from the lack of a clear definition of the term "contraband of war". Hübner maintains that it is absolutely necessary to define this term precisely to prevent all abuse and misuse of the rule.

Hübner treats the subject of contraband before that of visitation in his book since the first opportunity to ascertain the nature of the cargo would be at the level of visitation. The issue is introduced as covering the mutual rights of belligerents and neutrals in relation to the navigation of the latter.¹⁴² He restates that aiding and abetting a nation against its enemy, without doubt amounts to taking part in a war and the action in question symbolises a breach with that "reasonable equilibrium" which characterises the conduct of neutral nations. The nature of the goods can therefore reveal whether a neutral is aiding a belligerent party or not in his belligerent pursuits.

According to Hübner, the only lawful justifications for capture of either ship or goods, was if it was obvious that a belligerent ship was masking itself as a neutral, or if a ship was carrying contraband despite flying an "honest flag" (neutral flag, sometimes also called free flag).¹⁴³ Hübner attempts to take us through a structured and nuanced presentation of what he calls "a transitional state". It is transitional, he says, because the act of assessing whether

¹⁴⁰ Hübner (1759) V.I. p.178-179.

¹⁴¹ See chapter 4 of this thesis, and Hübner (1759) V.I. p.118.

¹⁴² Hübner (1759) V.I. p.165.

¹⁴³ A specific issue of prize-law is whether the ship itself also can be confiscated when contraband of war is discovered on board.

cargo is contraband or not during visitation precedes the capture of the ship and the declaration of lawful prize by a court.

Hübner goes back in time and begins with the customs of “the ancients”. He describes their practices, stating that they had almost no notion of what one would call “contraband of war” in Hübner’s time. However, he provides his readers with an historic example after the first Punic war (264-241 BC), the Carthaginians hindered Roman merchants from carrying rations to their enemies with the aim of starving them out of their strongholds and into submission. However, he says, if one looks past rationing or war ammunitions destined for places under siege, the belligerents of the antiquity rarely obstructed neutral powers’ freedom of commerce. He then goes on to present his reflexions on the conduct and reasoning of “modern times”. He claims that it has since the ancients been the rule that neutral ships are barred from trading with ports under siege or blockade, and above all to keep from carrying any war ammunition to such places. To this he adds the development of a rule expressing that it should also be illegal to carry any such goods to ports under enemy sovereignty. To goods of this kind, one has given the name “contraband of war”. He explains that during the course of time the “spirit of commerce” has become the main concern of governments and therefore has led to a widening of the notion of contraband. So much so that in certain cases the commerce and industry of some nations has seen itself totally engulfed by the term and subsequently in ruins, at least during wartime. This statement reflects the overall sentiment in Hübner’s book and his opinion on the maritime policies of the great naval powers of his time. It must be read and understood in the context of Denmark’s politically sensitive position during the Seven Year’s war.

6.3.2 Definition and classification

According to Hübner, neutral nations’ freedom to navigate and trade with anyone, belligerents included, is a fundamental right. The circumstances of war, which turn merchandise into contraband, are exceptions to the rule. Therefore it cannot be perceived as a general means by which to qualify all or a major part of tradable and exportable goods from a neutral country as contraband.

Hübner insists that, since a belligerent's moral right to harm his enemy is constantly modified by the "perfect and inviolable right of the neutral", it follows that there must be some sort of gradation of what is to be called contraband of war. Thus, a neutral ship's cargo would be more or less the object of capture or confiscation, depending on its classification: a neutral ship's cargo can be more or less perceived as contraband. Since it is the rules of neutrality that decide what is contraband in wartime and what is not, a neutral ship's cargo would become more or less contraband by virtue of the sale, provision and transport with belligerents. A cargo's nature and its destination are susceptible to influence the captor's actions and behaviour towards the neutral ship. Hübner asserts that by "contraband of war" one has to understand:

"All things that neutral nations cannot sell, provide or carry to/for belligerent nations, without violating the laws of neutrality."¹⁴⁴

Hübner addresses the limitation of the definition of contraband of war as illegal "merchandise". He defends that some things, although they cannot be called merchandise, nonetheless fall within the spirit of the notion of contraband of war. Those are transportable elements such as troops and recruits and similar¹⁴⁵, which are not exactly the objects of commerce, nevertheless remain extremely useful in a war-effort and should be illegal for a neutral to transport on behalf of belligerents during wartime. However, he does not address the matter further and continues his discussion on the issue of contraband by employing terms such as "marchandise", "cargaison" and "prohibé de guerre" interchangeably.

According to Hübner, a neutral ship's cargo is divided into three categories. The first category contains things that are only of use in war or that are primarily of use in a war and that have a direct and immediate relation to its operations. There would be no doubt concerning its use by a belligerent. Those goods are always perceived as contraband during hostilities

¹⁴⁴ Hübner (1759) V.I. p.189.

¹⁴⁵ Hübner (1759) V.I. p.179.

because of their nature. He goes on to present an extensive and very detailed list, extending from soldiers to ammunition, from timber to sails, from horses to ropes.¹⁴⁶ Goods that fall under this category are always seizable.

The second category of goods in Hübner's classification, are those that serve equally in peacetime as in wartime. They are not exclusively meant for war-use since they do not directly and immediately relate to military operations. Their use is therefore more difficult to foresee than in the first category. Because of their dual nature, these goods are considered contraband, mainly based on their destination. The category consists of goods such as gold and silver, grain, food and fodder, clothing and equestrian equipment.¹⁴⁷ The goods are in some cases seizable, depending on the circumstances, and sometimes even forfeitable.

The third and last category of goods, are those neutral ships can carry without trouble, because they are not necessary in a war and do not bear any relation to its operations. They

¹⁴⁶ Hübner's full list of goods in the first category: trained troops; recruits; sailors; cavalry horses; cannons, mortars and other artillery; supports, guns and firearms; bombs, cannonballs, grenades, bullets and cartridges; gunpowder; swords; sabres, bayonets and other knives; construction woods of a certain breadth, especially curves and masts specific to fourth rank ships (later called fourth rate – these were small ships) or above, masts of twenty-four palms or more; large sails meant for these vessels; ropes of a certain width, especially cables for use on the aforementioned vessels; armours; sapper hats; barbed wire; fascines; and generally anything of the same nature as the above specified. Hübner (1759) V.I. p.180-181.

¹⁴⁷ Hübner's full list of goods in the second category: gold, silver and copper, coined or mass, grain, corn, cured meats and other foodstuffs of first and second necessity; hay, straw, bread, flour, and other food and fodder; saddles, bridles, stirrups and other parts necessary to rider equipment; bar iron, steel, lead, saltpetre, hemp, flax, tar, pitch, resin; skillfully worked firearms and knives; boards and other timber suitable for fifth rank vessels and below; ropes, sails, masts, pulleys and other equipment for such vessels; large canvases, large sheets and other fabrics suitable for clothing troops and less wealthy citizens; pickaxes and other tools to move earth; tanned leathers, boots, consequently, everything that is of dual use and relative to the economy and commerce in peacetime as it is to military operations during wartime. Hübner (1759) V.I. p.182.

consist of goods such as, books and paper, drugs and groceries, luxury goods and fashion attire.¹⁴⁸ The goods of this category are never seizable, neither can they be declared as lawful prize, except in the case where they are sent to places under siege or blockade. In such situations, it is the will of the attackers or blockaders that decides whether the ship is allowed to pass or not. A blockade is a means of warfare by which a belligerent cuts all communication to and from an enemy port with the view to keep anyone (neutrals included) from providing his enemy with provisions and supplies of any kind. Blockade was the other widely used warfare institution employed which restricted maritime commerce and navigation. Thus, goods in this category are deemed “free” on the basis of their nature, with the very special exception of blockades.

Whilst blockade is an absolute and indiscriminating geographic restriction, the principle that comprehends the term contraband of war is far more conditional. However, there’s little doubt that Hübner’s categorisation and lists of goods are meant to be exhaustive. Yet, his second category of dual-use goods depends on several circumstances to be effective. The duality of their character makes it necessary to ascertain their legality based on destination. He is not the only one to employ a category of dual-use goods or “conditional contraband”. Also Grotius operated with such a category however his basis for condemning them was a little different from Hübner’s.¹⁴⁹ Grotius’ approach was based on the principle of necessity: the belligerent would be able to capture by way of “requisitioning” goods found on neutral vessels under particular circumstances when their transportation to an

¹⁴⁸ Hübner’s full list of goods in the third and last category: books, papers, drugs, medicinal plants (simples), grocery stores; foodstuffs of fourth, fifth and sixth necessity (Hübner is silent on the subject of those of third necessity) and pure luxury goods; fashion merchandise; house ornaments; and generally anything that one could call superfluous, and which only serves the conveniences of life, and the delicacy of the table, or to satisfy the whim and fancy of wealthy citizens. Hübner (1759) V.I. p.183.

¹⁴⁹ Grotius also operated with a three-category approach. However, while his first category contained contraband goods, the second encompassed free goods and the third category delimited dual-use goods. Grotius (2005) p.1189-1190; Wheaton (1841) p.172.

enemy might represent a danger to him.¹⁵⁰ However, if one strictly follows the principle of necessity, it only allows a sequestration of goods, not confiscation, since the latter is not *necessary* to avert the danger posed by the goods. Hübner's approach seems to be inspired by Grotius since he also lists raw materials, naval stores and provisions as dual-use goods.¹⁵¹ However, Hübner stresses the duties of neutrality by which the fate of goods that fall within the intermediate category is decided. Consequently, carrying such goods does not violate the duty of abstention such as "pure" contraband goods do. Trade in dual-use goods is to be regulated by the second duty of impartiality. The only requirement therefore is that a neutral merchant does not favour its trade with one belligerent more than the other. The goods are classified according to their nature and destination. However, this classification coincides with the legal reaction they trigger, such as capture and confiscation. The goods are classified in order to determine the appropriate reaction: whether the ship is seizable, whether it can be declared good prize or not.

According to Hübner's reasoning the imposed ban of not carrying certain goods to the enemy is not based on the rights of war since those only concern belligerent parties. The ban stems from the strict duties of neutrality, which as we know count two key conditions: neutrals must abstain from any involvement in war-operations, and must observe in all their affairs and dealings a perfect impartiality towards the belligerent parties. Thus, the right to capture and confiscate first category goods emanates from the first duty of neutrality, when said goods are meant for belligerent use. The first duty of neutrality also allows the capture of any merchandise when it's destined for places under siege or blockade. The transport of such goods under such circumstances is considered to be a direct participation in the ongoing conflict and therefore a violation of the duties established by the laws of neutrality. Goods that fall into the second category can only be captured and confiscated when there is a violation of the second duty of neutrality; when neutrals have violated their perfect im-

¹⁵⁰ Neff (2000) p.20.

¹⁵¹ Wheaton (1841) p.171. However, Hübner never mentions Grotius expressly when treating the issue of contraband.

partiality in relation to the belligerent powers. Goods such as timber meant for construction, naval stores or food provisions are considered contraband when a neutral refuses to provide equally for the opposing belligerent party.

Hübner here states a strict obligation of impartiality, however he fails to elaborate on the practicality of this approach. For example what happens if the opposing belligerent party does not need the same type of merchandise and provisions that are indispensable for his enemy. Nor does he elaborate on some of the issues relating to specific problematic goods, such as timber. Hübner only places goods into his second category without explaining its difficulty. Timber, for example, was an especially important and complicated issue. One often distinguished between types of timber: if it was suited for ship construction or not; the type of ship it would be used for etc. However, although the original contention was that timber that obviously could not be used in war-material construction in any way, was not considered as contraband, the belligerent powers would capture any timber found on neutral ships and claim it as susceptible for belligerent use.

6.4 Different theoretical approaches to the issue of contraband goods

There were deviating approaches to the issue of contraband during the 18th century although there was general agreement that contraband trade was prohibited during wartime. For Vattel, the law of contraband was an uncomplicated application of the general right of belligerent nations to take any actions they deemed “necessary” to win the war. This comes through, to some extent, in his definition of contraband in his major work, *The Law of Nations*:

“Commodities particularly useful in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses, - and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine.”¹⁵²

¹⁵² Vattel (2008) p.530.

Vattel was a practising diplomat and of the opinion that conventionally stipulated lists of contraband were useful and convenient devices for avoiding quarrels. They were however not the reflexion of some fundamental universal law on the subject. Accordingly, the law of contraband should be subject of alteration according to what the principle of necessity dictates at any given time. The strength of this approach is that it explained the practices of states during the seventeenth and eighteenth centuries. It was common to make unilateral declarations of contraband during war that subsequently imposed on neutral nations who didn't adhere to a treaty at the time. It also explains why it wasn't customary to punish neutral contraband carriers personally. The thought was that the neutral carriers committed no wrongdoing, as the right of belligerents only extended to obstructing the delivery of contraband to their enemies, not punishing those that transported it. The theory also had weaknesses. It didn't entirely explain why contraband goods should be subject of confiscation. Surely necessity did not cover this as it could only justify the belligerent preventing contraband goods from reaching their enemies. However, Vattel attempted a rationalisation by explaining that it would be impossible for a belligerent to capture and deter every contraband-carrying ship. It was therefore essential to create disincentives for neutrals to trade in such goods.¹⁵³

Hübner mentions Vattel once and claims that after Grotius, he is the only one of any consequence worth reading on the subject of neutrality. Nonetheless, having stated his respect for Vattel's work, he briefly hints that there might be some issues they disagree on. Typically Hübner does not elaborate or explain this statement. However, having studied Hubner's work, and Vattel's short treatment of the issues concerning the rights and duties of neutrals, here more specifically the issue of contraband, it could seem like Hübner is referring to a divergence with Vattel's basis and foundation for the classification of goods and its limitation on maritime commerce, here neutral commerce. While Vattel bases the institution of contraband on the belligerent's right of self-defence and the necessity to prevent the rein-

¹⁵³ Vattel (2008) p.530.

forcement of his enemy¹⁵⁴, Hübner founds the institution of contraband of war on the duties of neutrality: abstention and impartiality. Hübner partially rejected the necessity principle and claimed that there existed a clear frame of rights to which existed corresponding duties for both belligerent and neutral powers during hostilities. They agreed on the subject that the belligerents right to condemn, capture and confiscate contraband is based on “necessity”. Where they disagreed was on the subject whether the application of the principle of necessity automatically superseded the neutrals right to trade.

According to Hübner (and also van Bynkershoek), the law of nations forbids neutrals of carrying contraband. This conception was based on the view that carrying contraband was a violation of a neutral’s fundamental duty of abstention from all hostilities. Hübner ties the issue of contraband firmly to the rule of neutrality. By clearly defining a commodity’s nature as contraband or not, one can also determine whether it makes good and lawful prize and decide more justly on the fate of the ships crew, cargo and the ship itself. He underlines the importance of defining contraband by the two cornerstones of the rule of neutrality.¹⁵⁵ A neutral carrying contraband would therefore be breaking the law.¹⁵⁶ In this manner also, his approach differs from Vattel’s. It upholds the view that contraband is fixed by a permanent set of rules, the body of which would constitute a law of contraband. It therefore cannot be altered by the belligerent’s capricious claims of “necessity” at any given time. Bynkershoek’s view is to a great extent similar to that of Hübner. However, where Hübner presents a three-category classification, Bynkershoek only offers two. He does not open for any middle category for dual use goods. His classification is much more rigid. According to him, goods are either contraband or not.¹⁵⁷

On the subject of contraband of war, Hübner’s approach resembles a combination of the rules of the medieval “*Consolato del mare*” and the principle of “free ship, free goods”. We

¹⁵⁴ Vattel (2008) p.529.

¹⁵⁵ Hübner (1759) V.I. p.193-194.

¹⁵⁶ Hübner (1759) V.I. p.95-98, 100-101, 190-191.

¹⁵⁷ van Bynkershoek (2008) p.74-82.

recognise some of the main ideas of Hübner concerning the status of ships and the extent of the right of belligerents to capture neutral vessels. They do not, however, contain the nuances on the nature of goods and variation of situations that Hübner seems to have covered in his thesis.

The dominant tendency during the 18th century was to lengthen the list of goods considered as contraband, in treaties and other agreements. And although the lists presented by the belligerent powers were originally meant as exhaustive, they were considerably stretched and interpreted quite widely by the prize courts. In cases from the middle of the 18th century, British prize courts held that contraband enumerations included in treaties were merely exemplary, and therefore did not preclude the parties from making unilateral additions.¹⁵⁸ The consequence of this was that only goods that were expressly declared and determined as “free” would not be treated as contraband and thus were safe from capture and confiscation. Another development during the 18th century was the widespread application of the dual-use goods expression (also known as conditional or relative contraband). As we have seen, Hübner operated with such a category. The consequence of this categorisation was that dual-use goods were considered good prize when destined to a port under belligerent jurisdiction. The rule was that goods susceptible to belligerent use and hostile destination are considered contraband. Thus the goods are defined both by their nature and destination in opposition to the categories of free goods or absolute contraband goods, which are only defined by their nature.

Some scholars claimed that the object of the classification of some commodities as contraband of war were meant to limit such interdictions to a few commodities so that trading in the rest would be free.¹⁵⁹ By this view the classification of contraband goods did not serve as an infringement or to injure the trade of neutral nations, but merely to regulate it. As Kulsrud puts it:

¹⁵⁸ Neff (2000) p.64.

¹⁵⁹ Kulsrud (1936) p.244.

“[...] the idea underlying the classification of certain articles as contraband of war was to restrict the prohibitions on neutral trade with enemy ports, not blockaded, to a few articles useful in waging war”.¹⁶⁰

However, an 18th century neutral merchant and “champions of neutrality” such as Hübner, would have protested this claim, since the definition of contraband of war applied by the great naval powers seldom was restricted to “a few articles”. Maritime doctrines such as blockade, contraband and continuous voyage were often invoked by belligerents in order to eschew the principle of free ship, free goods. The influence of the doctrine of contraband could be seen in the numerous regulations and ordinances issued by governments at the beginning of each new war to serve as guidelines for their privateers. These regulations would often contain detailed instructions and lists of goods of which trade with the enemy would be considered as contraband.

However, there was no disagreement on the fact that some goods should remain absolutely prohibited to trade during wartime, even among the most vocal advocates of neutral trade. A universal prohibition to supplement belligerents with war material is all well and good, but there is little gained by such a ban without a clear rule on what constitutes such material. The issue of contraband was an issue defined by a lot of controversy and discord¹⁶¹ because of the prevailing uncertainty and absence of a general rule and because it was applied as an absolute exception to the principle of free ship, free goods. The source of the uncertainty might be that the belligerent use of goods changes with time and therefore makes the law of contraband change with it. However, there seems to be an indication that the prohibition is not merely founded on the rights of war but on the law of neutrality in accordance with the doctrine laid forth by Hübner in 1759.

¹⁶⁰ Kulsrud (1936) p.249.

¹⁶¹ Wheaton (1815) p.175.

7 Characteristics, legacy and afterthought

These last pages are dedicated to outlining Hübner's role in the development of neutrality law by ascertaining the change he presented through analysis of his work as well as comparison to his peers and contextualising his work contemporarily. The aim is to determine Hübner's distinguishing features as well as his impact.

7.1 Basic features of Hübner's theory

7.1.1 Findings

This thesis shows how Hübner elaborates and defines his concept of neutrality and how he applies his doctrine on relevant issues of international law during the 18th century. Four distinctive features characterise Hübner's approach and discussion on neutral rights and duties.

The first distinguishing feature is an essential breach with previous neutrality theory. It concerns how he links neutral capture to the laws of neutrality, rather than to those of war. Capture is therefore no longer simply a belligerent right, there are also neutral rights to consider during wartime. Compared to his precursors and contemporaries, Hübner downplays the importance and effect of the "just war" doctrine on neutral rights and duties. The older doctrine makes a position of non-belligerency difficult since impartiality is an impossible position to hold in a world of just war, because it was any state's moral duty to support the "just" belligerent in his cause. Hübner does mention the premise of "just war", but he neither develops nor includes it as a basis for his discussion on the mutual rights and duties of belligerents and neutrals. His brief reference to "just war" is simply in relation to the belligerents themselves and their motives for war. By removing the formerly decisive element of "just war", Hübner makes neutrality morally legal. He is undoubtedly part of the development during the French Age that strived towards a more formal concept of war. This approach made it possible to conceive and advance a firm and more logical concept of impartiality, which is one of the pillars of neutrality.

This does not mean that Hübner entirely disassociates neutrality from the state of war. He acknowledges that a state of war between others triggers a set of rules of conduct for those who claim to be neutral and do not wish to be part of the hostilities. However, he does not individualize the rights and duties of neutrals on the basis of those of belligerents, but presents them rather as an independent body of rules. He makes neutrality an independent legal status with its own predetermined set of rights and duties.

Hübner calls his body of rules “laws of neutrality”, which are based on principles of natural law that conform to the “laws of sociability” and “pure reason”. This basis is his second distinguishing feature. The core of Hübner’s view of human relations is that of “sociability”. The world, as Hübner sees it, is a community whose natural state should be one of harmony and peace, and the natural duty of each nation is to strive to this end, which contrasts with the Hobbesian view. Ultimately for Hübner, the nations’ conduct towards each other must be regulated by the “rules of sociability”. In his system, each European power can protect its own interests while living in a state of peace with everyone else. This fulfils the ambition of the Enlightenment of furthering universal happiness and welfare. The inspiration for natural law and the law of nations is reason. “Sane reason” as Hübner calls it, became the foundation for all civilised societies that the European powers of the Enlightenment were built upon.

Hübner associates the conditions of sociability and reason to his conviction that the universal law of nations is *the* means of improving the world. He presents a confrontation between self-interest and self-conservation on the one hand, and the natural equity of nations sociability on the other. This confrontation, he esteems must be resolved by applying principles of the law of nations. The law of nations was in his opinion the means of resolving all conflicts and restoring peace as quickly as possible.

His ideas and axioms developed from his fundamental understanding of natural law are universally applicable and not restricted to situations of neutral capture at sea. However, the third and truly distinguishing element in Hübner’s neutrality-discussion is how he de-

finer neutrality in general terms on the basis of the principle of freedom of the seas. His idea was that since all navigation is free on the high seas, the intention and motivation behind neutral navigation and activity should be free as well. What then of neutrality issues on land? It's difficult to adjust this approach to a general and universal law of neutrality applicable everywhere. Hübner defines neutrality as a perfect and universal right such as the principle of the freedom of the seas that concerns all mankind. This in contrast with others who defined neutrality out of the rights of war, which although perfect are not universal since they only concern belligerents. Hübner's approach could therefore be seen as a model, so that the issue of neutrality on land should also be based upon another universal principle, similar to that of the freedom of the seas. However, it's difficult to see which similar universal principle to the freedom of the seas that advocates a space of no-jurisdiction, might be applicable in places under different sovereign jurisdictions that is the case on land.

The fourth distinguishing feature of Hübner's work is his attempt at creating a code of predetermined mutual rights and duties for neutrals and belligerents. It's important to note that natural law is *the* source of law in Hübner's discussion. Although he assembled a number of relevant treaties in the last part of the book, he first and foremost created a body of rules, a codex. Hübner, it seems, wished by the creation of a clear codex to enlighten and facilitate the understanding and application of rules and principles of international law. Misunderstanding is the source of all conflict. Therefore by clearly defining rules on the subject of the law of armed conflict, and more specifically, in maritime affairs, peace is more easily maintained and/or restored. The codex of well-defined and unwavering rules that he presents is, according to himself, based on indestructible and permanent principles of natural law.

Hübner argued that there would always be some contradiction between the rights of war and those of peace and neutrality. To remedy this problem, the solution he says, is to grasp the solution most in the spirit of the universal law of nations and "the common good of humanity". This would remove the opposition while at the same time ensure the most es-

sential part of the exercise of the rights of both belligerent and neutrals. In this way, Hübner fixes the rights and duties on all sides and consequently gives birth to a law of nations that is obligatory for all, since it is just and reasonable and in conformity with the central principles of the code of humanity. If both sets of competing rights are completely and rigorously applied, the contradiction becomes impossible to resolve. The law of nations would be in the absurd situation of being in opposition with itself. It's therefore the duty of reason to find an equitable modification of the rights and to remove the contrast without withholding the two respective parties of their most essential rights.¹⁶² Hübner wishes to serve the international community by creating a handbook with "practical" approaches to probable issues concerning neutral and belligerent interaction on the high seas.

7.1.2 Comparing Hübner

Having now presented the main findings of the study of his work, let us compare them with the other theories of his time and the perception of him today.

Among the emerging neutrality doctrines of the 18th century, there seemed to be general agreement on the two main components of neutrality: abstention from participation in hostilities, and perfect impartiality in relation to the belligerent parties. Something that falls under abstention must not be done at all. Something that falls under impartiality may be done, provided it's done equally for both belligerent parties

In the 18th century, three scholars: van Bynkershoek (1673-1743), Vattel (1714-1767) and Hübner were challenged by the central issues of international law of their time and sought to articulate doctrines of the rights and duties of neutrals. There was a great abundance of rules and treaties concerning the law of neutrality that varied greatly and was source to many different understandings of the term "neutral". The reason for this was the absence of

¹⁶² Hübner (1759) V.II. p.115.

a general or universal theory as a basis for neutrality law.¹⁶³ The doctrines of the three scholars varied somewhat, but for the first time a strict concept of neutrality was implied, and a right for neutrals to see their interests, property and territories protected. This laid the foundation of modern neutrality law. Scholars of international law of the Enlightenment saw the need to create or at least define a general law of neutrality applicable when the situation of absence of a treaty arose. The question therefore is where and how did they find this general rule?

Hübner's approach became one of three "schools of neutrality" that came into existence during the second half of the 18th century. Stephen C. Neff defines these three schools as the conflict-of-interest (or necessity) theory, the code-of-conduct theory and the community-interest theory.¹⁶⁴

The three schools of thought that emerged during the 18th century did not seek to create an entirely new rule of neutrality out of thin air, but rather to assemble, weigh and redefine rules and practices that had existed since the Middle Ages. This proved to be difficult as it was often nearly impossible to apply or harmonise their theory with the practices of the time. Their approach to the concept of neutrality also differed from their medieval counterparts in that they developed the concept of neutrality as a legal status. Writers and thinkers like Machiavelli and Bodin had rather used the concept as a sometimes-useful political or diplomatic tool. Whereas Van Bynkershoek, Vattel and Hübner developed neutrality as an institution of the law of nations¹⁶⁵ applicable to non-belligerents in the event of a war.

The conflict-of-rights school (sometimes called the "necessity-school"), inspired by thinkers like Grotius and developed by Emer de Vattel, made the point that the rights of the bel-

¹⁶³ Scholars such as the Dutch van Bynkershoek insisted that conventional law had not contributed to a general law of neutrality, because of the treaties' limited applicability. They only concern the contracting parties. Neff (2000) p.44.

¹⁶⁴ Neff (2000) p.45.

¹⁶⁵ Grewe (2000) p.372.

ligerent prevail over those of the neutral. This was based on the notion that the belligerent was entitled to apply any means necessary to beat his enemies. The key word here is “necessary”. The community-interest school, professed by thinkers such as the Italian diplomat Alberico Galiani (1728-1787), rejected the necessity-principle, claiming that the rights of belligerent and neutral nations must be weighed against one another to find a point of equilibrium. The main goal of this process was to attend to the interests of the international community, more specifically, maintaining a state of peace.

The code-of-conduct school’s way of thinking was introduced by Martin Hübner. As we have seen, Hübner attempted to strike a fair balance between the opposing interests of the belligerent and neutral parties, and subsequently guaranteeing them both a core of fundamental and immovable rights. According to the code it would therefore be allowed to act “unlawfully” towards another nation if the latter has violated a rule of the predetermined “code of conduct”. The conflict-of-rights school and the code-of-conduct school were the two major neutrality schools that arose during the enlightenment.¹⁶⁶ The approach of Hübner’s doctrine would become the dominant school of thought on the rules of neutrality in the 19th century.

Hübner and the code-of-conduct school have been “accused” of being biased towards the rights of neutrals as the US Supreme Court alleged in *The Nereide*-case of 1815. On the other hand, the conflict-of-rights school’s approach has sometimes been deemed to be markedly pro-belligerent. The school went far in allowing belligerent states to capture any goods, which they decided could assist their enemy.¹⁶⁷

¹⁶⁶ Neff (2000) p.56.

¹⁶⁷ Ward (1801) p.9-10.

Hübner was criticised by some of his contemporary writers for other reasons as well.¹⁶⁸ The main criticism is that Hübner is reluctant to acknowledge that there were many instances of neutral merchants manifestly undermining the war efforts of belligerents and greatly benefiting from the wars of others. Another and well-deserved criticism, is that he is not always very practical and sometimes contradicts himself. This is most clearly seen in his treatment of judicial jurisdiction of prize courts where he proposes the creation of mixed courts to treat cases of neutral prize, while completely refusing to relate to the situation of his time where prize courts were national courts.¹⁶⁹

In recent scholarship, Neff and Grewe's treatment of Hübner's work pick up most of the distinguishing features of his approach to neutrality. Grewe conceded the basis of Hübner's neutrality theory as the principle of freedom of the seas. He also briefly stated that Hübner, with other theorists of the 18th century, overcame the traditional doctrine of just-war.¹⁷⁰ However, he did not treat the nature of Hübner's work as a code of conduct, such as Neff. By defining Hübner's theory as a "code-of-conduct" doctrine, Neff outlines and cleverly describes Hübner's handbook approach. However, he fails to feature Hübner's breach with former just-war doctrine and the firm basis of his "code" which is his conviction of mankind's sociability and natural state of peace.

They both mention however, that Hübner's work was part of the emerging proto-positivist school, in which other scholars such as Van Bynkershoek are included.¹⁷¹ Proto-positivist

¹⁶⁸ Among the British, Ward (1801) as well as the Sardinian-French Azuni (1798) and French, Valin (1763).

¹⁶⁹ Hübner V.II. p.43-69.

¹⁷⁰ Grewe (2000) p.375, 411, 422.

¹⁷¹ However, there seems to be a marked distinction in the application of the theories of Hübner and van Bynkershoek for example in the cases of the British Admiralty. While the court of admiralty often applied the teachings of van Bynkershoek in order to legitimise the high-handedness of British maritime practices, Hübner, "the champion of neutrality" seems to have been too "pro-neutral" for the British magistrates. Indeed the Danish scholar Schlegel, a student of Hübner's work, applied Hübner's theories in his critique of the case of *The Maria* by the great English judge Sir William Scott. He also described how the British

theories of the 18th century marked a transformation in the content of the jurisprudence of neutral rights codifying into law the theories of the scholars of this school at the expense and detriment of the just-war theory of Grotius.

7.2 Influence

One of the main concerns during the 18th century, that features repeatedly in Hübner's work, was the possibility for neutral vessels to be able to trade even during times of war. Among the scholars of his time, Hübner wrote most about the issue of neutral commerce during wartime.

The development of the rules of neutrality during the 18th century brought forth a power shift between belligerent and non-belligerent or neutral nations. The shift did take time. Perhaps it was not dramatic, but it opened up for a stricter distinctness of the rights of non-belligerents. Traditionally, the principle of just war meant that the just belligerent was entitled to use any means necessary to obtain victory over his enemies. Because their rights were secondary to those of the just belligerent, the non-belligerent nations suffered greatly as a result of the warmongering of other nations. However, towards the end of the 18th century, a change took place, albeit over a long period of time and not necessarily in a consistent and linear manner. Hübner's approach to neutral rights in *De la saisie des bâtiments neutres* is very much an example of this detachment from the rigorousness of just-war doctrine. This detachment resulted in an international discussion on whether a neutral was allowed to trade during wartime. A crucial question that emerged from the Seven Years' War was whether it is possible for a merchant to stay truly neutral when the spoils of his activities likely could help or harm belligerents?

magistrate turned the teachings of the Dutch scholar to the British party's advantage, sometimes misquoting or using arguments out of the original context. *Frihetens forskole* (2013) chapter 14; Neff (2000) p.87,89.

In 1759, the same year as the publication of *De la saisie des bâtiments neutres*, the English lawyer James Marriott expressed his views on the dealings of neutral traders during the Seven Years' War in an open letter to the Dutch merchants living in England:

“Merchants, however amiable they are in uniting the Bonds of universal Society, notwithstanding the Separation of Countries, Climates, Manners, Religions and Governments, however useful they are in softening the natural Wants and Miseries of Mankind, or in controlling the fatal consequences that flow from the Ambition of Princes, and in extending over the World the Connections of Humanity, yet as they form a kind of separate Republic of themselves, independent of the several Governments under which they live, their Connections in one Relation often jar with their Duties in another, since they make a Link in that Chain in which the Enemies of their Country are not less united.”¹⁷²

According to Marriott the merchants' activities united them in an endeavour that often transcended and sometimes even conflicted with state interests. Consequently, a paradox appeared where the commercial societies on the one hand united many and promoted peace whilst at the same time their interests collided with the nation-states they belonged to. Marriott wrote particularly about the Dutch merchants, but this perception could be equally applied to all neutral merchants during the Seven Years' War. The on-going globalised commercial warfare that took place during the war prompted the development of a new position and awareness of the neutral status. Especially the position of neutral trade had to be reassessed since the economies of the different nation-states were becoming increasingly interrelated and integrated.

De la saisie des bâtiments neutres came out at a time of great political turbulence. The peace after the Great Northern war (1700-1721)¹⁷³ was the beginning of a new era for

¹⁷² Marriott (1759) p.15-16.

¹⁷³ War in which a coalition (Denmark, Poland, Saxony) led by Russia opposed Swedish supremacy in Northern, Central and Eastern Europe. It resulted in Sweden's loss of her imperial possessions in Central Europe and Russia becoming the major power in the Baltic area under Peter the Great.

Denmark. While it had meant the loss of an empire for Sweden, Denmark came out in a slightly better position having increased its territory through the possessions of the Duchy of Gottorp in Schleswig and their union with the Duchy of Holstein. However, with the rise of Russia and Prussia, Denmark permanently became a lesser power. A consequence of the country's meagre resources and lack of opportunity was that it was imperative for its welfare to remain at peace. It did so for over two generations after the Peace of Fredriksborg in 1720. One of the main concerns of the ministers of the Crown was to maintain a diplomatic policy that was beneficial to their economic policy. Danish chief ministers, among them two Bernstorffs (where the elder was Hübner's mentor), believed that the prosperity of the country relied upon the successful development of commerce and industry. This led to the development of "an intensive mercantilist policy" which required the protection and promotion of the shipping industry whilst at the same time creating monopolies and establishing colonies to extend existing Danish trade and to introduce it abroad.¹⁷⁴ The great maritime wars between France and Britain enabled the Danish statesmen to achieve their goals. Here existed the opportunity to benefit during wartime without being part of the conflict. However, the Danish plan of great commercial maritime expansion came into conflict with the interests of the belligerent powers.

A large part of the international political discussion during Hübner's time was devoted to the issue of maritime neutral trade. The question was a result of the two-sidedness of neutral doctrine that developed during the 17th and 18th centuries. First, the perception derived from natural law and the positive view of trade as a product of human sociability. Which was indeed a view supported by Hübner. Second, the view based on the principles of mercantilism by which international trade was no more than an alternative means of warfare and thus neutrality was merely considered an immoral abuse of a war-situation.

In Hübner's opinion, sociability was a fundamental prerequisite for trade, and therefore trade is considered a characteristic of civilised society. It was generally believed during the

¹⁷⁴ Kulsrud (1936) p.8-9; Feldbæk (1998) p.204.

17th and 18th century that economic growth and expansion would lead to both domestic and international peace as well as securing the augmentation of the wealth of nations. Hübner's argumentation was therefore in harmony with one side of the political and economic theory and discourse of his time. Hübner's approach to this difficult issue was to uphold a concept of active neutrality. By this is meant the opposite of the traditional view supported by for example Van Bynkershoek of passive neutrality, where the general conviction is that neutrality is a state of absolute inactivity and abstention from all war-related matters, even commerce. Hübner was part of one of the distinguishing factors of the 18th century discussion of neutral rights, which started to outline a notion of neutrality as being something other than simply a political position of non-belligerency.

Hübner based his neutrality doctrine on principles of natural law, perhaps in order to eschew the political, economic and diplomatic order of his time. Consequently, his theory could be applied despite of trade-related tensions and hostilities. However, he insisted on a strict definition of neutrality. Thus, the definition could control the behaviour of nations who wished to remain neutral and prohibit them from pursuing new areas of trade and keeping them from manifestly benefitting from the misfortunes of others.

Nevertheless, Hübner's motive behind his defence of neutrality is not always clear. We are therefore left with the question of whether the argumentation for equality between nations may they be belligerent or neutral, is the author's true motive, or whether it is rather the economic interests connected to the liberty of an unlimited neutral trade? Hübner claims that since he is a citizen of a neutral nation, he is consequently impartial in his writings on the subject of capture at sea. In this manner, he conveniently skirts the issue of the obvious interests connected to a widening of the commercial horizon of neutral trade. Denmark was neutral at the time of the publication of Hübner's work in the on-going war, but it had as previously stated considerable economic interests at stake. Thus, we find a dualism in the circumstances and events surrounding Hübner and the publication of his book. On the one hand, Hübner seems very much the ideological theorist distanced from politics and ambitions of his government. On the other hand he is very much so a representative of this gov-

ernment and directly involved in the diplomatic and legal matters of his neutral country. This involvement was most clearly seen in the development of international neutrality alliances.

7.2.1 Hübner and the armed neutrality of 1780

Discussions concerning neutrality during the 18th century were a two-sided affair on yet another level. One side considered the issue of neutrality as a concrete and practical question concerning traders, ship-owners, diplomats, navy officers and lawyers. Questions concerning neutrality, in this context, related to the limit between legal and illegal actions and behaviour during war: if a captured ship could or could not be declared as good prize; on the definition and categorisation of contraband goods, on commerce blockades and the right of belligerents to visit ships sailing under neutral flag. All these were practical issues demanding practical answers and were the main concerns in diplomatic correspondence during war in the 18th century. The other side of the discussion considered neutrality as an important principle of natural law. Discussed by theorists and scholars it was pondered as an improved means of organising international relations rather than the *realpolitik* that had dominated Europe since the Peace of Westphalia. Europe was in this period dominated by conflicts and deep antagonism.¹⁷⁵ War was the default status of the continent and states' ability to partake in and finance wars was essential to their survival. The concept of neutrality alliances such as the one that came to life in 1780 could therefore be perceived as a step towards a new more harmonious and peaceful cohabitation.

The Danish government was not alone in seeking Hübner's expertise and advice. The French Foreign minister Etienne François duc de Choiseul¹⁷⁶ placed considerable energy into the attempt of uniting the neutral countries in the middle of the 18th century. The idea was that the British war effort during the Seven Years' war should be impeded by the adherence of several states to the premises of an armed league of neutral states. Although the

¹⁷⁵ Müller (2012) p.41.

¹⁷⁶ Foreign minister to Louis XV 1758-1761 and 1766-1770. *Encyclopædia Britannica* (1911) vol. 6, p.261-262.

neutral position at the time was far from united, there was more than enough criticism directed at the methods of the British navy and Admiralty courts among the neutral powers. The proposition of a maritime league of neutral nations was therefore far from a preposterous one. There had been precedents to such a league in the intended region. As early as 1690, Denmark and Sweden had attempted to enforce their concept of neutrality in the Baltic. Choiseul concentrated therefore his efforts on this area. It was believed that the geographic position enabled the greatest chance of strategic success. The reasoning being that it could easily be closed to the ships of nations refusing to respect the rights of the neutral nations. Such an impediment would be to great disadvantage to British commerce and economy as they relied heavily on Baltic and Norwegian naval stores, particularly timber. The British prime minister at the time, William Pitt the Elder, was somewhat pressured into ceding some ground to the protest of the neutral powers for fear of them committing themselves to the French proposition of an armed league of neutrals, or worse still, joining France in her war effort against Great Britain.

Choiseul asked Hübner to meet him at Versailles in October of 1759. The request was motivated by the on-going war with the British and the wish to question the Danish theorist on matters of international maritime law. By the time of the meeting at Versailles, the French suffered heavy setbacks and were seeking means by which to conclude hostilities without ceding too much to the British. After the battle of Minden 1. October 1759, Hübner had revealed to some Frenchmen close to Choiseul some ideas for a peace agreement. The latter was therefore keen to hear the ideas first-hand. The French foreign minister agreed with nearly all the ideas presented by the Danish theorist. He was however anxious not to concede too much to the British although peace was an extremely desirable outcome for the French at that moment. Hübner managed to convince him that brokering a peace agreement with Great Britain would also bring him great honour amongst his countrymen by the restoration of peace and end of misery of war. Some small sacrifices to the benefit of the enemy would then be a small price to pay. Choiseul asked Hübner to be his representative on a secret mission to London to ascertain whether the British would agree to a peace agreement similar to Hübner's proposal. Hübner however countered that he needed the permission of

the Danish government, particularly that of his benefactor, the Danish foreign minister Count Bernstorff the Elder. By the end of the conversations between the two men, Hübner had received orders from Copenhagen and was to return to Denmark with the view to go on to London to plead the Danish case to the British government.¹⁷⁷ Although the conversation and correspondence between the two men didn't lead to an immediate peaceful result, it nevertheless consolidates Hübner's standing as a respected scholar on matters of the law of nations and neutrality.

On 21 April 1762, Hübner sent Bernstorff a proposition for a treaty between Denmark and England with his arguments.¹⁷⁸ Hübner's ideas were not always the most practical, however his convictions and ideals shine through the two main axioms of his drafts "articles fondamentaux" where he presented two main guidelines for neutral and belligerent inter-state relations pertaining to neutral commercial navigation. That contraband should be positively defined and enumerated between two parties so that no provision, merchandise or cargo is reputed or declared as such either by induction or otherwise, if it is not specifically mentioned on the mutually and communally dressed list. And the parties should agree that no ship is to be stopped, condemned or molested in any way unless carrying contraband. The exception was circumstances where a ship is destined to a port formally under siege or effective blockade, since all communication with such places was prohibited to all. The draft was for the most part rejected by the elder Bernstorff, which illustrates the rather difficult political climate he worked under. However, they are believed to be the blueprint for A.P. Bernstorffs' treaty proposal for the armed league of 1780.¹⁷⁹

Hübner's greatest direct and immediate influence is considered to have been exerted on The Armed Neutrality of 1780 (1780-1783), which was built on the cooperation between so-called neutral states of the time: Sweden, Russia and Denmark. The agreement was for-

¹⁷⁷ Bajer (1904) p.209.

¹⁷⁸ Bajer (1904) p.209.

¹⁷⁹ Bajer (1904) p.208.

malised by a neutrality alliance that Prussia, Portugal and the Kingdom of the two Sicilies joined later.¹⁸⁰ This neutrality alliance was officially directed at all belligerents of the American War of Independence (1775-1783). However, in reality it was an opposition and counter-weight to the maritime practices of Great Britain.

The league of 1780 differed from those of 1691, 1693 and 1756 in that it formally presented a comprehensive set of rules based on specific principles to be made effective throughout the world. These principles were expected to be universally respected regardless of opposition from other nations. The league had effectively drawn up a blueprint and armed themselves to compel the rest of the world to follow what the members regarded as the correct application and understanding of maritime custom, treaties and prize court rulings. The doctrine was based upon the conception of the law of nature and the law of reason of the political and legal philosophers of the period. As Kulsrud puts it: “The Danish professor of jurisprudence, Martin Hübner, was its prophet; the Danish secretary of foreign affairs, A. P. Bernstorff, its propounder.”¹⁸¹

7.2.2 The declaration of 1856 and forward

Although the 18th century was largely characterised by discordance on subjects such as neutral trade and derived issues such as contraband, the 19th century with its rise of the spirit of positivism, saw Hübner’s code-of-conduct school emerge as the most important approach. Continental scholars and jurists preferred the deductive approach of Hübner, whilst the British and Americans followed Sir William Scott’s pragmatic approach.¹⁸² The Declaration of Paris of 1856 was a step towards universal codification of neutrality law.

At the conclusion of the Treaty of Paris on 30 March 1856, which ended the Crimean War (1853-1856), the plenipotentiaries also signed a declaration of maritime law during war-time whose main aim was the abolishment of privateering. The so-called Declaration of

¹⁸⁰ Feldbæk (1998) p.206.

¹⁸¹ Kulsrud (1936) p.10.

¹⁸² Neff (2000) p.56.

Paris Respecting Maritime Law was signed on 16 April 1856 and was the result of a *modus vivendi* initiated between France and Britain in 1854. It is considered the first major attempt at codifying the international law of the sea. Both powers agreed upon principles of maritime law during wartime, which had for several centuries been the subject of uncountable disputes. The crucial points of agreement concerning the issue of contraband however, are the second and third provisions that declare: “2. The neutral flag covers enemy’s goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag.”¹⁸³ The only important state refusing to adhere to it was the United States that refused to accept the declaration because of the clause abolishing the use of privateers. The United States claimed privateers were essential if a nation was to keep a strong maritime presence and also wished to include a complete exemption of private property from capture at sea. However, the United States changed its view during the Civil War and the Spanish-American War and declared it would respect the Declaration during the hostilities. The Hague Convention of 1907 clarified and expanded on the provisions of the 1856 declaration. On the subject of neutrals carrying forbidden merchandise and goods the convention states:

“The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.”¹⁸⁴

This definition of contraband conforms to a great extent to Hübner’s definition. However, although Hübner operated with a strict definition of the term in his first category, he also wielded a second category that widened the application of the term somewhat.

Hübner was sought, read and applied during the second half of the 18th century and beginning of the 19th. However, his influence and renown waned completely after the Declaration of Paris of 1856. The reason must simply be that with the declaration of 1856, priva-

¹⁸³ *Encyclopædia Britannica* (1911) vol.7. p.914.

¹⁸⁴ Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907, article 6.

teering was abolished, and thus the central problem that instigated Hübner's work more or less disappeared. Privateers were no longer capturing neutral merchant vessels on the high seas. However, although Hübner's handbook on how to tackle situations of neutral capture had now lost a big part of its relevance, his doctrine and structuralisation of neutrality remained important since it was brought forward and further assimilated in the development of neutrality law. Amongst others, his work influenced American writers, scholars and politicians during the American war of independence.

7.3 Final words

The position of neutrals and other non-belligerents underwent an important conceptual change during the 18th century. The law of neutrality, much as law generally, developed according to the needs of practice.

Hübner's discussion on the rights and duties of neutrals further enriched the development of neutrality law because of his distinctive ability to combine arguments from the law of nature and history with a detailed knowledge of the situation of Danish neutral navigation during the Seven Years' war. The book, as do other sources such as his correspondence with Count Bernstorff and his other important work *Essai sur le droit naturel*, illustrate Hübner's distinct way of reasoning. This reasoning was the premise for his singular approach to the legal concept of neutrality. It is characteristic in the way he approaches his subject from different points of view. His analysis of neutral rights is a combination of legal and diplomatic considerations and matters of economic interests.

Hübner seems to have been an ideologist. While continuously writing in a style of *de lege ferenda*, he often restricts his treatment of current affairs and practice to sharp criticism of the world around him. However, protected by his status of neutrality emanating from his citizenship of a neutral country, Denmark, and encouraged by his claims of being "a citizen of the world", Hübner's proposed codex of neutral and belligerent behaviour is a presentation of an ideal world, where the biases of economic expansion and world hegemony do not come into play. Also the persisting lack of reference to his peers and forbearers in his work seems to show a wish of doctrinal independence.

Legal theory from the middle of the 19th century recognises that a change did take place during the French age:

”Now, when a war arises between two states, the interests of all neutrals are more affected than formerly; or in other words, neutral power has increased more than war power, and the tendency is more and more towards such alterations of the code of war as will favour neutral commerce.”¹⁸⁵

The position of neutrals evolved during the 18th century. Hübner’s contribution was undoubtedly an integral part of the blooming of neutrality as a concept of international law.

¹⁸⁵ Woolsey (1878) Part II, Section I, p.262.

*Neither nature nor art has partitioned the sea into empires.
The ocean and its treasures are the common property of all men.
Upon this deep and strong foundation do I build, and with this
cogent and irresistible argument do I fortify our rights & liberties.*

President John Adams.

8 Annex

Complete list and summarised description of the documentation Hübner meant a neutral ship should carry at all times.¹⁸⁶

The passport: is documented permission from the neutral sovereign, which allows the captain or owner of the ship to navigate. Consequently, this paper must indicate the name of the captain, of the ship, its place of fabrication, and its home berth. Any further information is arbitrary, Hübner says. It could indicate the destination of the ship, the quantity and quality of the merchandise on board, but this could also be left out. The last enumeration does nothing to the character of the passport. This piece is absolutely necessary for the safety of neutral navigation to be able to prove the ship's neutrality.

The sea waybill: contains specifications as to the cargo of the ship, its gauge, its port of departure, the residence and name of the captain and the ship's name and place of origin. Hübner claims that although very important this document is less so than the previous one, since the former supplies almost all, possible information.

The certificate of ownership: proves whether the ship belongs to subjects of a neutral power or not. It is enough that the ship is built in a neutral shipyard or that it is of "neutral fabrication". When the ship is built in/by a belligerent nation, it is crucial to be able to prove that the ship has been bought from the belligerent power before the declaration of the on going war; or that it was captured and declared good prize since said declaration of war. In the first case, a bill of sales must accompany the certificate of ownership and in the second, a certificate proving it to be "good prize" and that it was legitimately sold.

The crew list: An exact list of all the members of the crew with their name, age, class, place of residence and place of birth, must always be on board the ship. Hübner says these docu-

¹⁸⁶ Hübner (1759) V.I. p.241-252.

ments can be extremely useful when attempting to determine the neutrality of the ship. If the majority of the crew consists of people born or living in the same neutral country, and especially if they're born in the same country as the ship's captain and the ship's flag, these circumstances speak for the neutrality of the ship. Although Hübner says this is not an exact method, it is always useful to see if the crew are neutral subjects or not.

The Charter-party: Is a contract between the trader or charterer and the owner or captain of the vessel, whereby the first charters the ships and the second undertakes to transport the merchandise to their intended destination. The document must contain the name of the contracting parties and of the ship, its range, the price of freight, the time and place of loading and unloading, a specification of all the merchandise and all the conditions the contracting parties have agreed upon. Since the Charter-party is an authentic piece of documentation, which is used to verify of the bill of lading, it follows that the document is quite necessary to prove the neutrality of a merchant ship.

The bill of lading: Is a receipt whereby the captain of the ship concedes to have received and loaded the merchandise of the trader, and promises to carry it from one place to another. The receipt should contain the carefully itemised list of merchandise to be carried, the quantity, the weight, the quality of the merchandise in addition to the containers they are transported in: cases, chests, sacks and bundles, etc. However, the bill of lading is not necessary as the Charter-party since the latter is a much more complete document than the former and is an official document, whereas the bill of lading is only a private document between the freighter and the owner.

The shipping invoice: Is an explicit list of the loaded merchandise with an account of its quantity and quality, its cost at first purchase as well as the provisions, salary of the dealers, the freight or other transport costs, insurance-costs, rights of exit, as well as all incidental expenses, currency rates, profit, and sales-price of the merchandise. However this document does not determine the status of the ship or the regularity of its conduct. It therefore does not matter whether it's on board the ship under visitation.

Naturalisation papers: By which the captain, master or patron of the ship proves that he is truly a citizen of a neutral nation. However, the passport should supply the necessary information on this subject, therefore the letters of naturalisation or citizenship are not necessary to prove the neutrality of the ship.

The log: is a document in which the captain of the ship marks the ports and bays the ship passes from the day it leaves port until it arrives at its final destination with all the events of the journey, the changes of weather, etc. However, although this document might be very interesting and instructive, it is not necessary to determine the neutrality of the ship.

The inventory: the register of effects, in addition to the cargo as such that are aboard the ship, which specifies the property of the captain, crew and passengers, with the status of spending of food, provisions, right of anchor, and other expenses and similar incidental costs. However, since it only concerns the economy of the ship and its navigation, it is not of direct necessity during the visit of a merchant ship.

The health certificate: is a document by which the captain proves that neither he nor the rest of the crew and passengers come from a place distressed by epidemics or contagion. This document is therefore necessary for the convenience of the navigation of a ship, and to facilitate its operations, because it can sometimes exempt it from quarantine. However, it is not irrelevant to the security of the ship and for the purpose of visitation.

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